Deprogramming Corporations

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For valuable comments and conversations, I thank Atinuke Adediran, Afra Afsharipour, Matthew Bodie, Sofie Cools, Luca Enriques, George Georgiev, Sarah Haan, Jennifer Hill, Anjali Katta, Aneil Kovvali, Jed Kroncke, Ernest Lim, Ann Lipton, Dorothy Lund, William Moon, John Morley,

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Keywords: corporations, corporate governance, law and economics, law and political economy, social consequences

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Abstract

This essay explores the agenda of "deprogramming" the orthodox approach to U.S. corporate law and scholarship. Prompted by the Law and Political Economy (LPE) project but drawing largely on the Law and Economics (L&E) movement it critiques, it argues that central L&E frameworks—modularity, corporate law as contract, agency costs, and corporate law as product—operate as blinders: they artificially narrow corporate law's subject matter and obscure issues of externalities, inequality, corporate power, and geopolitics. Key L&E theories such as "nexus of contracts" and the "market for corporate control" were not purely technocratic concepts but interventions in a broader agenda, including efforts to delegitimize corporate social responsibility, cabin antitrust scrutiny of mergers, and limit government intervention in corporations. Yet some blinders, such as the fetishization of limited liability, persist not because of L&E, but despite the critical resources L&E supplies for overcoming them.

Beyond mapping the familiar critical moves and calls for transformational institutional reform, this essay redirects attention to the overlooked social and political consequences of traditional corporate law mechanisms currently at risk of erosion. Corporate law is a polyfunctional governance technology that produces social spillovers: its familiar doctrines shape not only intra-firm governance but also broader patterns of accountability, distribution, and corporate power. For instance, expropriation by controlling shareholders through related-party transactions not only harms investors but is typically economically regressive and further concentrates wealth and political power. Likewise, liability schemes and transparency requirements may foster broader public accountability and forms of social control over corporate power. Deprogramming corporate law, in this sense, requires not only examining potential institutional transformation but also a fuller reckoning with the social and political consequences of tools already at hand.

Introduction

The emerging movement on Law and Political Economy (LPE) aims to overcome the "pervasive view of law that encases 'the market' from claims of justice and conceals it from analyses of power."[1] A core LPE commitment is to illuminate the role of law in contributing to

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* Beneficial Professor of Law, Harvard Law School. For valuable comments and conversations, I thank Atinuke Adediran, Afra Afsharipour, Matthew Bodie, Sofie Cools, Luca Enriques, George Georgiev, Sarah Haan, Jennifer Hill, Anjali Katta, Aneil Kovvali, Jed Kroncke, Ernest Lim, Ann Lipton, Dorothy Lund, William Moon, John Morley,

economic and political inequality.[2] Beyond the "technocratic façade," the LPE critique goes, the Law and Economics (L&E) movement that has dominated law schools "smuggles in a vision of social life shaped by market hegemony and an erasure of the powerless."[3]

Responding to this challenge, this essay offers an initial exploration of "Deprogramming Corporations."[4] It argues that prevailing forms of "programming" in corporate law artificially narrow the field's scope in ways that misdescribe real-world developments and foreclose normative contestation. "Deprogramming," in turn, surfaces the "frequently unasked questions" that this narrowing produces. The stakes of these questions fall not only on corporate-law specialists but also on those who might otherwise treat corporate law as hostile terrain to be avoided: public-interest lawyers, movement lawyers, and scholars working in the LPE movement or other critical traditions.[5]

I describe how the dominant theoretical frameworks of L&E—modularity, corporate law as contract, agency costs, and corporate law as product—have long operated as conceptual blinders. By artificially restricting the objectives of corporate law, these frameworks obscure critical questions of externalities, inequality, corporate power, and geopolitics. This narrowing is both descriptively inaccurate and normatively troubling. Yet it remains deeply influential, even as the policy landscape has grown more complex and encompassed broader stakes such as concerns about inequality, concentrated power, systemic risk, sustainability, human rights, and democracy. Still other blinders in standard programming, such as the fetishization of limited liability and corporate separateness, arise despite L&E rather than because of it, with L&E analysis providing the tools to challenge them.

This essay shifts attention back to the overlooked social and political functions of longstanding corporate law mechanisms. Consider related-party transactions: when controlling shareholders engage in abusive self-dealing, the harm is not limited to minority investors. Such expropriation is usually economically regressive, further concentrates wealth and political power, and might increase systemic risk. Similarly, doctrinal tools such as liability rules, shareholder proposals, and transparency requirements have effects that extend beyond internal governance—

Anthony Niblett, Elizabeth Pollman, Anindu Rentala, Wolf-Georg Ringe, Arthur Sadami, Bruno Salama, Holger Spamann, Roy Shapira, Reilly Steel, Alvin Velazquez, and participants in the Symposium on The Integrity of Corporate Law held at the University of Toronto Faculty of Law. I am also grateful to the Harvard Law School LPE Student Association for the invitation that prompted this essay. All errors are my own.

1 Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1784 (2020).

2 Adam Chilton, Joshua C. Macey & Mila Versteeg, *Contemporary Law and Economics*, 93 U. CHI. L. REV. 301, 305 (2026).

3 Sarath Sanga, *The LPE Critique of Law and Economics*, 93 U. CHI. L. REV. 543, 543 (2026). Sanga, a mainstream L&E scholar, finds that the LPE critique "is a compelling critique because, at root, it is correct." *Id.*

4 This essay grows out of a lecture I delivered at Harvard Law School at the invitation of the Law and Political Economy (LPE) Student Association, as part of its "Deprogramming" series, a set of talks examining "with a critical lens on how the law is shaped by, and in turn shapes, who has and does not have political and economic power."

5 *See*, *e.g.*, Alvin Velazquez, *Using Business Law to Build Labor Power*, 61 HARV. C.R.-C.L. L. REV. __ (forthcoming 2026) (defending uses of business law for those seeking to enhance labor power).

they help generate broader forms of public accountability and social control over corporate actors, even if not all-powerful.

A caveat at the outset: this effort at deprogramming comes, perhaps paradoxically, from an author shaped less by LPE than by the L&E tradition that LPE critiques. That background inevitably influences what I notice and what I bracket. But it also creates an opportunity: to take the L&E mainstream seriously on its own terms, to ask what corporate law looks like once its default settings are made visible and open to contestation, and to avoid the trap of mischaracterizing traditional and current L&E contributions that might plague LPE efforts.[6] The pages that follow highlight limits of traditional L&E, note how the paradigm has been transforming, and identify productive overlap with LPE that deserves further exploration.

This reaction is also historically grounded, as it was developed at a time when major, controversial reforms of U.S. corporate law had recently come through and several others were still on the horizon.[7] Although the system was far from ideal before these changes, they represent a marked turn for the worse from the perspective of corporate accountability. This context also imprints a conservative bent on my analysis: even if the previous system was profoundly imperfect, its deterioration still represents a major loss. Indeed, one of my main claims is that standard programming has narrowed our analytical frame and vocabulary in ways that imperil our capacity to resist the ongoing erosion of U.S. corporate governance principles, which were greatly influenced by, but never fully adhered to, the tenets of programming.

This essay proceeds as follows. Part I introduces the key concepts of corporate law programming, including their limits and points of contestation, and situates them in the broader political projects associated with leading L&E theories. Part II examines doctrinal fetishization as an element of programming, with limited liability as a case study, and argues that L&E has often aided, rather than resisted, critical perspectives on the status quo. Part III describes the broader stakes of corporate law that standard programming tends to obscure. Part IV depicts a crisis in programming arising both from real-world developments and from challenges within L&E. Part V explores how programming has produced "frequently unasked questions" about corporate law's effects in society. Part VI cautions that LPE is not ideologically neutral, and that genuine deprogramming requires critically examining all analytical lenses. Part VII concludes.

[6] This has been, correctly, a main qualm of L&E scholars against LPE scholarship. *See* Chilton, Macey & Versteeg, *supra* note 2, at 301 ("L&E has been misunderstood and misrepresented by the emerging law and political economy (LPE) movement."); Sanga, *supra* note 3, at 543 (criticizing the LPE movement as "curiously unlettered," constructing "an elaborate structure of critique without engaging with the discipline it claims to dismantle.").

[7] The 2024 and 2025 reforms to the Delaware General Corporation Code stand out here, together with various recent proposals and initiatives by the U.S. Securities and Exchange Commission. *See* Part V *infra*.

I. The Conceptualization of Programming

Although not typically part of the 1L curriculum,[8] Corporations is a quintessential law school course.[9] The connection between corporations and private power should be patently obvious. Corporations are central institutions in modern life. Early corporations of the modern era were intimately intertwined with the exercise of state power and colonial expansion.[10] Today, they are richer and more powerful than many states. In fact, the largest and most powerful corporations are multinationals whose actions and impact often transcend the jurisdiction of any given state. Corporations control a significant fraction of public utilities, infrastructure, and carbon emissions, as well as all major social media and artificial intelligence companies. And corporate power is at the heart of rising concentration of wealth in the new class of billionaires, as the ranks of the world's wealthiest individuals are dominated by controlling shareholders or superstar CEOs of U.S. public companies.[11]

The seeds of Deprogramming Corporations could be seen at the inception of the project leading to the LPE movement. The LPE project was funded by the William and Flora Hewlett Foundation's "Beyond Neoliberalism" initiative, then headed by former Stanford Law School dean Larry Kramer. In his article articulating the Beyond Neoliberalism vision, Kramer placed concerns with corporate law and governance at the forefront. He argued that the private sector was "dramatically reshaped" by the neoliberal ideas of Friedrich Hayek and Milton Friedman—"from models of corporate governance to the role of business in society, how workers and executives are paid, and how the financial sector operates."[12]

Traditional programming works to erase several key social concerns from the Corporations curriculum and scholarship.[13] These include basic *economic* considerations such as (i) negative

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[8] This might be changing. For instance, Business Associations is now a 1L elective in many U.S. law schools.
[9] Many law schools use the broader term "Business Associations" or "Business Organizations."
[10] *See*, *e.g.*, PHILIP J. STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY FOUNDATION OF THE BRITISH EMPIRE IN INDIA (2011).
[11] On the concept of superstar CEOs, *see* Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH. U. L. REV. 1353 (2023).
[12] Larry Kramer, Memorandum to the Board of Directors of the William + Flora Hewlett Foundation, *Beyond Neoliberalism: Rethinking Political Economy*, https://hewlett.org/wp-content/uploads/2018/04/Beyond-Neoliberalism-Public-Board-Memo.pdf.
[13] To be sure, "the Corporations curriculum" is not monolithic. Individual instructors, including some at elite institutions, teach the course in ways that depart sharply from the framing described here, often with explicit critical, distributional, or political-economy commitments. The course description for Jon Hanson's Corporations course at Harvard Law School in the spring of 2024 is illustrative: "Paying special attention to the relationship between power, inequality, and legitimacy, this course will take a highly critical and systemic view of corporate law and corporations. We will be at least as concerned with identifying the deep causes and harmful consequences of corporate law and corporate power as we will be with the details of corporate law doctrine itself." *See also* HOLGER SPAMANN & JENS FRANKENREITER, CORPORATIONS 563 (3rd ed., 2025) (arguing that both remedying contracting imperfections and preventing externalities on non-contracting parties are legitimate rationales for corporate law, even though the latter goal has been narrowed by the internal affairs doctrine). The argument here is not that every classroom replicates standard programming, but that programming nonetheless shapes the recognizable mainstream against which heterodox versions of the course define themselves, much as it shapes the recognizable mainstream of scholarship

externalities and (ii) distribution, as well as broader concerns such as (iii) corporate power, and (iv) geopolitics. Programming accomplishes this both by erecting artificial boundaries around the scope of corporate law and by imposing blinders with respect to real-world boundaries, including geopolitical ones. This means that concerns about nonshareholder interests, corporate power, and inequality are deemed "outside the scope" of the field. At the same time, jurisdictional and geopolitical boundaries are ignored or treated as irrelevant. This is especially significant because corporate law is a field in which standard L&E arguments have significantly penetrated U.S. corporate jurisprudence and practice.[14] Although the analysis that follows focuses on corporate law as it is conventionally understood in the United States, the same narrow orientation toward agency costs and shareholder value extends to the surrounding fields of securities regulation, the regulation of mutual funds and asset managers, and pension fiduciary law (notably ERISA).[15]

A clarification is essential before proceeding. To identify the limitations of programming is not to jettison L&E as a method. L&E can be, and has been, illuminating in numerous respects: it makes assumptions explicit, highlights tradeoffs that intuition obscures, generates testable predictions, and disciplines normative argument with attention to consequences. This essay draws on its insights throughout. The limitations identified here are largely contingent features of mainstream L&E as traditionally practiced, rather than flaws inherent in economic analysis itself. Indeed, as Part IV explains, this standard form of programming is already in crisis within L&E itself.

I now turn to the theoretical moves used to justify this framework in corporate law: (i) modularity, (ii) the corporation as contract, (iii) agency costs, and (iv) corporate law as product. I also explore the fetishization of corporate separateness and limited liability, a component of programming that persists mostly despite, not because of, the lessons of L&E.

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even as critical and reformist work has long flourished alongside it. A systematic empirical account of variation across syllabi, casebooks, and classrooms is a worthwhile project, but lies beyond this essay's scope.

[14] *See*, *e.g.*, Stephen Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 858 (1997) ("Perhaps the most telling evidence of the success of law and economics in our field, however, is that many leading corporate law judges and lawyers now rely upon economic analysis extensively. Both judicial opinions and practitioner publications are."). *See*, *e.g.*, *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024) (McCormick, C.) ("Delaware law imposes fiduciary duties on those who control a corporation. Why? Because fiduciary duties exist in part to minimize *agency costs* caused by the divide between economic ownership and legal control.") (emphasis added). Nevertheless, courts have acknowledged but not fully succumbed to L&E programming. *See*, *e.g.*, Juul Labs, Inc. v. Grove, C.A. No. 2020-0005-JTL (Del. Ch. Aug. 13, 2020) (Laster, V.C.) ("it has seemed to me that notwithstanding scholarly approaches such as the widely embraced view of the corporation as a nexus of contracts (which I too regard as a helpful metaphor), the DGCL rests on a concept of the corporation that is grounded in a sovereign exercise of state authority: the chartering of a 'body corporate' that comes into existence on the date on which a certificate of incorporation becomes effective."). *See also* Jennifer G. Hill & Steve Kourabas, *Competing Visions of the Corporation and Fiduciary Obligations: Some Comparative Law Perspectives*, LAW & CONTEMP. PROBS. (forthcoming 2026) (examining U.S. judges' reliance on the contractarian model of the corporation from a comparative perspective).

[15] This narrow focus, among other things, disempowers labor from pursuing its interests through its role as a shareholder. *See* David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. REV. 2106 (2014); Leo E. Strine, Jr., *Stewardship 2021: The Centrality of Institutional Investor Regulation to Restoring a Fair and Sustainable American Economy*, 24 U. PA. BUS. L. REV. 1 (2021).

A. The Modularity Approach to Law and Economics

Corporate law is a prime exemplar of what I have termed "modular thinking in law and economics."[16] This framework, which implicitly underlies most of traditional L&E work, posits that each area of law can best contribute to social welfare by focusing on a single efficiency objective: tort law minimizes the costs of accidents, antitrust promotes consumer welfare, bankruptcy maximizes firm value for creditors, and the same reductive logic extends to virtually every field of law.[17] The stipulated role of corporate law is to protect shareholders by reducing agency costs.[18] By limiting the objective to efficiency, one follows the standard, if increasingly contested, L&E move of compartmentalizing all questions of distribution (an economic concern *par excellence*) within the tax-and-transfer system.[19] Voilà—one has achieved what Ronald Chen and Jon Hanson have termed the "disappearing distribution" trick, by which distributional questions are rendered entirely out of view.[20]

While the L&E move of compartmentalizing issues of distribution is well known and has been formally articulated and defended,[21] the modularity approach goes further by specializing not merely in efficiency, but also in a single efficiency objective within each field. This is an implicit but pervasive traditional L&E move. It means that questions of negative externalities, for instance, also fall out of view for corporate law. The logic is similar: there is another area of law "for that." If one is concerned with the environment, one is directed to environmental law. If one is concerned with workers, to labor and employment law. If one is concerned with systemic risk, to financial regulation. And so on. This specialization, however, is a historical artifact rather than a natural division of labor: corporate law itself once famously performed significant antitrust functions,[22]

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[16] Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953, 971 (2020).
[17] *Id.*
[18] *Id.* A recent addendum, with a stronger deregulatory bent, is that corporate law should strike a firm-specific balance between mitigating agency costs and principal costs. Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767 (2017).
[19] For the canonical formulation, *see* Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) (arguing that "redistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient"). For recent critiques from within L&E, see Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1053 (2016) (challenging the "now-conventional assumption that tax-and-transfer will always trump redistribution through other means"); Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as well as Efficiency*, 123 YALE L.J. 2478, 2483 (2014).
[20] Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 121 (2004).
[21] Kaplow & Shavell, *supra* note 19.
[22] HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 63 (1991) (describing the powerful antitrust function of early corporate charters, which frequently barred corporations from operating out-of-state, holding shares in other corporations, and engaging in activities not expressly contemplated by the charter). It was in response to these restrictions that many firms turned to the trust form to gain greater organizational flexibility, giving rise to the very term "antitrust." *Id.* at 64. *See also* Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 954 (2014) (describing how "[e]xploitation of market power came to be managed by separate bodies of antitrust and rate regulation law rather than by corporate law").

and the recasting of the field as concerned only with shareholder-manager relations was itself a twentieth-century achievement, as Part I.E explains.

In this modular framework, corporate law becomes specialized in the interests of shareholders, both because shareholders need protection as they are "locked in" the firm and because there is no other field in charge of protecting them.[23] Other interests, as programming teaches us, can be adequately protected by contract or by other areas of law. Because shareholders are residual claimants of corporations, their interests often align with maximizing social welfare, at least when regulations keep externalities in check.[24] Consequently, corporate law should focus exclusively on the internal relations between shareholders and managers, in particular by inducing effort and reducing opportunism by the latter. In prevailing economic parlance, now increasingly used by courts,[25] corporate law exists to reduce "agency costs"—more on this below.[26]

A key advantage of modularity is that it helps manage complexity.[27] Simplification and compartmentalization are not peculiar to L&E but a feature of science itself, which isolates variables and divides the world into disciplines so that finite minds can grasp it. However, a major problem with modular thinking is that different areas of knowledge, or fields of law, are not fully separable or "nearly decomposable," in Herbert Simon's terminology.[28] If gut microbiota turn out to affect brain function, that is still of interest to gastroenterologists. Understanding the ramifications of corporate law arrangements for other discrete social problems is not a call for omniscience.

Corporate governance arrangements often have implications that go well beyond agency costs and investor protection. Outsourcing solutions to these problems to other areas of law may be difficult or impossible—and risks leaving them entirely unaddressed. Consider a real-world example: if corporate law facilitates the grant of a US$56 billion, or US$1 trillion, compensation

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[23] On the relevance of capital lock-in, *see* Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253, 253 (describing shareholder's capital lock-in as the defining feature of the corporate form); Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1197 (1984) (describing the "enormous disadvantages" of shareholders in protecting themselves since "[t]hey are the only voluntary constituency whose relation with the corporation does not come up for periodic renewal," they "invest for the life of the firm and their claims are located at the end of the queue should liquidation occur," and "their investments are not associated with particular assets.").

[24] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1991) ("Frequently the harmony of interest between profit maximization and other objectives escapes attention."); John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What Is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 23 (3d ed. 2017) ("the corporation—and, in particular, its shareholders, as the firm's residual claimants and risk-bearers—have a direct pecuniary interest in making sure that corporate transactions are beneficial, not just to the shareholders, but to all parties who deal with the firm."); Aneil Kovvali & Joshua Macey, *Private Profits and Public Business*, 103 TEXAS L. REV. 1, 2-3 (2025) ("The view that corporations should be run for the financial benefit of shareholders presupposes that shareholders' financial interests align with broader societal interests.").

[25] *See supra* note 14 and accompanying text.

[26] See Part I.C. *infra*.

[27] Henry Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1701 (2012) ("Modularity is key to managing complexity. A system is complex when it has many interdependencies.").

[28] *See* Herbert A. Simon, *The Architecture of Complexity*, 106 PROC. AM. PHIL. SOC'Y 467, 473–75 (1962) (defining and explaining "nearly decomposable").

package to a charismatic CEO with large shareholdings following a controversial process,[29] which area of law can easily curb the detrimental effects of such extraordinary concentrations of economic or political power? Likewise, if one values board diversity intrinsically, or believes that diverse boards produce superior social-welfare outcomes, what other area of law could more effectively promote diverse boards than corporate law rules directly regulating board composition?

The leakage runs in the other direction, too. Tools from other legal fields have long performed work that the modular picture would assign to corporate law itself. Tax law is a clear example.[30] Greenmail has effectively disappeared in the United States not because corporate law eliminated it but because of a federal excise tax on greenmail profits.[31] The structure of share ownership cannot be understood without attending to the tax treatment of employee contributions, and many corporate transactions take the shape they do because interest expense is tax-deductible. In the 1930s, Congress deployed both the taxation of intercorporate dividends and utility regulation to discourage pyramidal corporate structures.[32] Corporate-governance objectives are often pursued through tax law, and tax instruments shape corporate structures more decisively than many doctrinal corporate-law rules. More generally, the relative appeal of modularity depends on the quality of the broader institutional environment—that is, on the capacity of each module to fulfill its assigned objective—and it is weaker in periods of crisis.[33]

Modularity has limitations across fields of law, but in corporate law the difficulty runs deeper. Corporate law is exceptional among legal fields because it structures the exercise of corporate power or, in the language of economics, the residual control rights that inevitably remain after contractual and regulatory obligations have been exhausted.[34] Because transaction costs and

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[29] *See Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024) (McCormick, C.) (finding that Musk's pay package was not entirely fair and ordering rescission); Tornetta v. Musk, 326 A.3d 1203 (Del. Ch. 2024) (McCormick, C.) (rejecting defendants' post-trial attempt to use a subsequent stockholder vote to overcome the previous ruling); In re Tesla, Inc. Derivative Litig., 2025 WL 3689114 (Del. Dec. 19, 2025) (per curiam) (awarding nominal damages rather than rescission). *See also* Abhirup Roy & Akash Sriram, *Elon Musk's $1 Trillion Tesla Pay Plan Wins Shareholder Approval*, Reuters, Nov. 7, 2025.
[30] I am grateful to Aneil Kovvali and Ann Lipton for this point and the tax examples.
[31] I.R.C. § 5881 (1988) (imposing a 50% excise tax on gain or other income realized on the receipt of greenmail). *See also* Spencer D. Klein & Enrico Granata, *"Greenmail" Makes a Comeback*, HARV. L. SCH. F. CORP. GOVERNANCE, Jan. 22, 2014, https://corpgov.law.harvard.edu/2014/01/22/greenmail-makes-a-comeback/ (describing the modern variant's need to be redefined to evade § 5881).
[32] Randall Morck & Bernard Yeung, *Dividend Taxation and Corporate Governance*, 19 J. ECON. PERSP. 163, 176 (2005).
[33] Kevin Davis & Mariana Pargendler, *Legal Heterodoxy in the Global South: Adapting Private Laws to Local Contexts*, *in* LEGAL HETERODOXY IN THE GLOBAL SOUTH 7 (Kevin E. Davis & Mariana Pargendler eds., 2025) (exploring "how inequality and crises have led Global South jurisdictions to embrace 'antimodularity' in private law in a distinct way from, or to a greater extent than, is currently the norm in the Global North").
[34] *See* Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 695 (1986) (describing firm ownership as "owner of an asset has the residual rights of control of that asset, that is, the right to control all aspects of the asset that have not been explicitly given away by contract."); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1120 (1990) ("ownership confers residual rights of control over the firm's assets"); Raghuram Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 QUART. J. ECON. 387 (1998) (expanding existing theories to cover the role of corporate power, or residual control rights, over critical resources beyond physical assets); Oliver Hart, Andrei Shleifer

bounded rationality prevent both contracts and regulation from anticipating every future contingency, both are necessarily incomplete. Corporate law therefore governs the exercise of power in ways that cannot be easily addressed by other bodies of law.

Corporations also challenge modularity in other respects. First, corporations notoriously exercise political power to shape the legal regime itself, including in ways that weaken the regulation of externalities.[35] Second, they increasingly operate as private lawmakers, governing the conduct of users, workers, and suppliers through platform rules, standard terms, codes of conduct, and supply-chain standards—and, in that respect, they are sometimes better analogized to governments than to private individuals.[36]

Finally, while *modularity* is a cross-sectional L&E move—now itself in crisis and one less suitable to corporate law—corporate law also has schemas of its own, some of them currently more influential than ever. Recall that LPE aims to fight the view that "encases 'the market' from claims of justice and conceals it from analyses of power."[37] In the most orthodox version of corporate law programming, this market focus comes from three moves: (i) the view of corporate law as *contract*, (ii) the focus on agency costs, and (iii) the view of corporate law as a *product* offered in a market for corporate charters.

B. The Corporation as Contract

Although the view of corporate law as contract has strong doctrinal roots in many jurisdictions,[38] U.S. law in fact broke from U.K. law by doctrinally adopting a more *entity*-centric conception.[39] The contractual conception of the corporation as a purely private matter is in any event a historical latecomer, since corporations were long chartered by legislatures as instruments

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& Robert W. Vishny, *The Proper Scope of Government: Theory and Application to Prisons*, 112 QUART. J. ECON. 1127, 1131 (1997) ("any regulatory policy can be interpreted as an (incomplete) contract and vice versa").

[35] Luigi Zingales, *Toward a Political Theory of the Firm*, 31 J. ECON. PERSPECT. 113, 114 (2017) (describing corporations' influence over the lawmaking process as a threat to economic prosperity and democracy); Leo E. Strine, Jr. and Nicholas Walter, *Conservative Collision Course: The Tension between Conservative Law Theory and* Citizens United, 100 CORNELL L. REV. 335 (2015) (explaining how corporations' political influence over regulation undermines the case for a strict corporate law focus on shareholder interests).

[36] *See*, *e.g.*, ELIZABETH ANDERON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229 (2015); Wentong Zheng, *Corporations as Private Regulators*, 55 U. MICH. J. L. REFORM 649 (2022).

[37] Britton-Purdy, Singh Grewal, Kapczynski & Rahman, *supra* note 1. *See also* Angela Harris & James J. Varellas, *Law and Political Economy at a Time of Accelerating Crises*, 1 J. L. POL. ECON. 1, 5, 10 (2020) (seeking to "broaden the discussion of legal regulation beyond the narrow bounds of "Law and Economics" and refuting "refusal of the idea that markets, or any other form of economic activity, is somehow prior to or outside of state power").

[38] *See*, *e.g.*, William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1473 (1989) ("History also shows that contract always has held a constitutive place in corporate legal theory. (…) However, history also suggests that the new theory goes too far in demanding that corporate law privilege contract.").

[39] *See* David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. 395, 404-05 (2012).

of public purpose. General incorporation laws arrived only later as a cure for corruption in corporate chartering rather than as a privatization of the corporate form.[40]

Within the programming, the contractual view of corporations is magnified and essentialized through the famous economic conception of the corporation as a "nexus of contracts."[41] This view sees the corporation as a nexus for the contracts with shareholders, lenders, suppliers, customers, managers, and workers. There is something to this view: these critical relations are central business concerns. I call it the corporate associate's due diligence view of the firm, or what is likely to appear in the corporate side of the data room in an M&A transaction.

Yet this is just a partial picture. Where is the state and the panoply of regulatory and tax obligations? Where are the stakeholders that lack a contractual relationship with the corporation, such as victims of environmental disasters? They are, of course, absent from view: out of sight, out of mind—relegated to another area of law, or to another course in the law school curriculum. Tellingly, these concerns are not absent from corporate practice itself, where the broader data room and the representations, warranties, and indemnities of an M&A transaction routinely address environmental, regulatory, tax, and tort exposures. This effacement is deliberate, not accidental. The nexus of contract view of the corporation is not politically neutral, nor was it ever intended to be, as Part I.E. explains.

In their influential "The Economic Structure of Corporate Law," Frank Easterbrook and Daniel Fischel likewise frame the field of corporations as a special area of law focusing on the "corporate contract."[42] Also in this view, these massive organizations are viewed as merely private affairs that do not affect third parties: "[b]ecause the choices do not generally impose costs on strangers to the contracts, what is optimal for the firm is optimal for society."[43] Yet this conclusion about the absence of third-party effects is not so much demonstrated as assumed. And, once assumed, it forecloses questions about costs that corporate activity routinely generates, and whether corporate law could help address them.

(i) Metaphor Confusion: Contract or Property?

Before proceeding, it is worth noting that the contract metaphor is not the only game in town in standard programming. The same result is sometimes achieved through an alternative metaphor—the corporation as shareholders' *property*. In his famous defense that "the business of

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[40] *See*, *e.g.*, Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting) ("it was believed that, under general laws embodying safeguards of universal application, the scandals and favoritism incident to special incorporation could be avoided"); Reilly Steele, *Systematic Corruption*, COLUM. L. REV. (forthcoming 2026).
[41] The nexus of contracts originates from Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). This framework was built upon earlier work by Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 778 (1972), which depicted the firm as "the centralized contractual agent in a team productive process." The specific terminology "nexus of contracts" was coined by Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 293 (1980).
[42] EASTERBROOK & FISCHEL, *supra* note 24, at 1.
[43] *Id.* at 6-7.

business is business" and that the "social responsibility of the corporation is to increase profits," Milton Friedman appeals to the property metaphor.[44] "In a free-enterprise, private-property system, a corporate executive is an employe of the owners of the business," he observes.[45] The property metaphor also undergirds the agency framework discussed below, where shareholders figure as the "principals" whom managers, as "agents," must serve.

The property metaphor, like the contract metaphor, is not technically accurate: a corporate executive is an employee of the corporation, not of shareholders. While economists describe shareholders as "residual owners" of the corporation, from a legal perspective "no one owns the corporation the way a person owns, say, a pair of trousers."[46] Interestingly, however, although contract and property are different concepts—in fact, different legal institutions deserving of distinct 1L courses—they have both been employed to the same end, often interchangeably, to narrow the scope of corporate law to a private matter between shareholders and managers alone.[47]

(ii) Contractarianism

An important, if contested, normative extension of the view of the corporation as contract is the so-called contractarian view.[48] This is not so much a view that corporations *are* contracts, but rather a normative claim that corporate arrangements should be governed by maximal freedom of contract and minimal legal constraint—much as contracts themselves are, or should be. Contractarian scholars argue that corporate law is (or, more importantly, should be) trivial.[49] Its sole role should be to provide default rules arguably mirroring what the parties "would have wanted," thereby minimizing transaction costs. On the descriptive side, they conclude that if a certain practice exists, it must be efficient; otherwise, the parties would not have adopted it. Not all L&E scholars are "contractarian" in this sense. For instance, leading L&E scholar Lucian Bebchuk denounces contractarianism as a "Panglossian argument" that "we live in the best of all possible worlds because the market ensures that the best arrangements are always adopted"[50]—sometimes summarized as the view that "what is is efficient."

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[44] Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970.
[45] *Id.*
[46] Charles Korsmo & Minor Myers, *What Do Stockholders Own? The Rise of the Trading Price Paradigm in Corporate Law*, 47 J. CORP. L. 389, 397 (2022).
[47] William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992) (contrasting the "social entity" and the "property" conceptions of the corporation, but noting that the latter model "might almost as easily be called a contract model, because in its most radical form, the corporation tends to disappear, transformed from a substantial institution into just a relatively stable corner of the market in which autonomous property owners freely contract.").
[48] *See* EASTERBROOK & FISCHEL, *supra* note 24 (for the canonical articulation of the contractarian view); Michael Klausner, *The Corporate Contract Today*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2025) (for a literature review gathering critiques to the contractarian view).
[49] *See* Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 544 (1990) (suggesting that state corporate law is trivial in the sense that it does not prevent the parties from establishing the set of rules they want).
[50] Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 888 (2005).

Contractarian rhetoric has nonetheless had significant influence, including in courts. Delaware courts increasingly describe the state's approach as "contractarian,"[51] and they do so both in corporate[52] and *contract* cases.[53] This suggests that the label does not mark the application of ordinary contract doctrine so much as allegiance to stylized ideal of private ordering and nonintervention—one that does not even fully describe contract law itself.[54]

(iii) L&E Critique of the Contract View

The view of the corporation as contract (or property) succeeds, often too beautifully, in narrowing the universe of relevant interests and supporting a presumption of no or minimal intervention. By contrast, progressive theories of corporate law have often sought to denaturalize corporations and highlight their role as creatures of state law.[55] However, the insistence that corporate organization depends on state law—and cannot be reduced to private ordering—has not

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[51] From 1998 to 2024, Delaware courts issued 128 decisions mentioning the term "contractarian." The distribution over time suggests a steady and accelerating increase in the use of the concept. Mentions are sparse in the early 2000s, but the number of decisions grows markedly after 2017, culminating in a peak of 19 decisions in 2024.

[52] See, e.g., *Brinckerhoff v. Enbridge Energy Company, Inc*, C.A. No. 11314-VCS, slip op. at 28 (Del. Ch. 2016) ("While our law's contractarian deference 'affords commercial parties the advantage of great flexibility to privately order their affairs, . . . that flexibility can come at a cost.'"); *Rosenbaum v. CytoDyn, Inc.*, 2021 WL 4775140, at *40–1 (acknowledging plaintiffs' argument that the Court "must strictly construe the Advance Notice Bylaw in order to stay true to Delaware's highly contractarian public policy" and recognizing that "the canons of contract construction apply when construing bylaws"); *Stream TV Networks, Inc. v. SeeCubic, Inc*., 279 A.3d 323, 355 (2022) ("enforcing the unambiguous Charter provision is consistent with our policy of seeking to promote stability and predictability in our corporate laws, and with recognition that Delaware is a contractarian state"); *Texas Pacific Land Corporation v. Horizon Kinetics LLC*, 306 A.3d 530 (2023) ("A Delaware court's answer to whether the No Drafting History Clause unduly limits the court's consideration of relevant evidence also must account for the contractarian paradigm that has come to dominate Delaware jurisprudence"); *New Enterprise Associates 14, L.P. v. Rich*, 295 A.3d 520, 567 (2023) ("Delaware's embrace of contractarianism extends to the corporate form, where it manifests as the concept of private ordering").

[53] *See*, *e.g.*, *Unbound Partners Limited Partnership v. Invoy Holdings Inc.*, 251 A.3d 1016, 1021 (2021) ("Delaware is a pro-contractarian state, and her law is loath to deter bilateral negotiation"); *PVP Aston, LLC v. Financial Structures Limited*, C.A. No.N21C-09-095 AMLCCLD, slip op. at 27 (Del. Super. Ct. 2022) ("Delaware is a contractarian state and recognizes contracting parties' right to limit a contract's assignability"); *Outbox Systems, Inc. d/b/a Simplus v. Trimble Inc.*, 2022 WL 36696773, at 26 (Del. Super. Ct. 2022) ("Delaware's contractarian principles have guided its courts in developing a nuanced jurisprudence for the analysis and enforcement of contracts"); *Great Hill Equity Partners IV, LP v. SIG Growth Equity*, C.A. No.7906-VCG, slip op. at 144 (Del. Ch. 2018)("Delaware embraces a contractarian outlook."); *Valhalla Partners II, L.P. v. Vistar Media, Inc.*, C.A. No. 2019-0202-SG, slip op. at 7 (Del. Ch. 2024) ("Delaware, as our courts often point out, is contractarian. That is because enforcing contracts as written—holding counterparties to their bargain—is of substantial benefit to society in general"); *Sunder Energy, LLC v. Jackson*, No. 2023-0988, slip op. at 26 (Del. 2024) ("Delaware is a contractarian state that holds parties' freedom of contract in high regard").

[54] *See*, *e.g.*, David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979 (2021) (suggesting that courts have considered external harm in adjudicating contract cases).

[55] *See*, *e.g.*, Carly Knight, *How the Corporation Lost Its Image as a "Creature of State*," LPE BLOG, Oct. 26, 2022 ("Resuscitating some version of the "creature of the state" view—or articulating new and better arguments for why corporate privileges do not reduce to merely private contracts—is an important part of reclaiming the progressive argument for increased corporate democratic accountability."); KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019) (explaining how capital is coded in laws, including corporate law); Simon Deakin, David Gindis, Geoffrey M. Hodgson, Kainan Huang & Katharina Pistor, *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. COMP. ECON. 188, 194 (2017) (arguing that firms "have to be treated as creatures of the law, where law itself is irreducible to custom or private ordering").

been the exclusive province of critical or LPE scholars. It has also been a central contribution of mainstream L&E analysis.

The foundational work of Henry Hansmann and Reinier Kraakman demonstrates that the key legal attributes of corporations enabling large-scale enterprise require state law and cannot be accomplished by contract alone.[56] The reason is that, unlike contracts, these attributes affect and reconfigure the legal rights of third parties. A leading example is what Hansmann, Kraakman and Richard Squire term *entity shielding*, the attribute that protects the assets of the corporation from the personal creditors of shareholders.[57] Corporate law is powerful not because it is contract but because it allows parties to achieve what could not be done through contract alone. It is *state law*, by providing firms with legal personality, that enables corporations to serve as a "nexus *for* contracts."[58] John Morley and Taisu Zhang have demonstrated that the rise of the modern state was a precondition for the emergence of the business corporation.[59]

Beyond asset partitioning in the form of limited liability and entity shielding, I have shown how legal personality also enables regulatory partitioning: the separation of the legal sphere of the corporation from that of its shareholders for purposes of legal rights, duties, and legal status. This separation shapes the corporation's relationship with the state as much as with private parties.[60] As with entity shielding, some degree of regulatory partitioning is essential for—that is, truly constitutive of—the existence of large-scale enterprise with multiple investors. But regulatory partitioning also allows firms to deliberately tailor the legal regime that applies to them and to frustrate the state's regulatory ambitions. Large corporations are rarely organized as a single legal entity; instead, they operate through multiple entities within a corporate group, with regulatory and tax arbitrage—made possible by regulatory partitioning—playing a major role in explaining these structures. Incorporation can therefore reshape the public-law and tax regimes applicable to the firm, once again affecting nonshareholders' legal position in ways that the contract conception tends to obscure.

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[56] Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393 (2000).
[57] Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1336 (2006).
[58] Armour, Hansmann, Kraakman & Pargendler, *supra* note 24, at 5. Margaret Blair has shown that this dependence on state law extends to the attribute of capital lock-in itself. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 454 (2003).
[59] Taisu Zhang & John Morley, *The Modern State and the Rise of the Business Corporation*, 132 YALE L.J. 1970 (2023).
[60] Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. PA. L. REV. 717, 721 (2021) (identifying the role of regulatory partitioning as an essential form of legal separation provided by the corporate form); Mariana Pargendler, *Regulatory Partitioning as a Key Role of Corporate Personality*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 265 (Elizabeth Pollman & Robert B. Thompson eds., 2021) (explaining how regulatory partitioning promotes regulatory arbitrage).

C. Agency Costs

Concerns that managers may run the firm against the best interests of shareholders have a long historical pedigree, running back to Adam Smith[61] and the seminal "The Modern Corporation and Private Property" by Adolf Berle and Gardiner Means, the former a member of Roosevelt's brain trust.[62] Yet the terms "agency problem" and "agency costs"—coined by Jensen and Meckling in their 1976 article aimed at delegitimizing CSR, as explained below[63]—came to carry the day and solidify the narrowing of the field. The very terminology of "agency" was borrowed from Milton Friedman's article against corporate social responsibility, which Jensen and Meckling originally sought to technically translate into formal economics.[64] In the process, however, they ended up developing a theoretical framework of their own as they found themselves disagreeing with Friedman's proposition that corporations did, in fact, maximize profits.[65]

The agency problem framework implicitly resolves the purpose debate by embedding in the terminology that managers are agents of shareholders, and that the problem of management power and abuse is limited to avoidable losses hence suffered by shareholders. Stakeholder interests, or social welfare more generally, are stipulated to be best served by focusing on shareholders' interests alone.[66] Coined by economists, the use of agency terminology is legally

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[61] *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) ("The directors of such companies, however, being the managers rather of other people's money than of their own, … cannot well be expected to watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company.").

[61] See Part I.C. *infra*.

[62] ADOLF BERLE & GARDINER MEANS, MODERN CORPORATION AND PRIVATE PROPERTY (1932). As later described by Berle, in 1932 their book "was thought so dangerous as to be almost worth suppressing." *Id.* Although this dimension was since mostly forgotten, Berle & Means's opus explicitly spotlighted "the concentration of economic power," including how "the ultimate control of nearly half of industry was actually in the hands of a few hundred men." *Id.* at 18, 46. *See also* Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433, 434 (1962) (noting how the book "was first brought out by a law publishing house then affiliated with the Corporation Trust Company. Discovering the viper they had nourished in their corporate bosom, publication was promptly suspended after a few copies had been sold.").

[63] *See* Part I.E. *infra*.

[64] Friedman, *supra* note 44; JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET 161 (2009). Friedman refers to "agent" terminology four times in his short op-ed. Friedman, *supra* note 44 (*e.g.*, "The whole justification for permitting the corporate executive to be selected by the stockholders is that the executive is an agent serving the interests of his principal.").

[65] Pioneers in Finance: An Interview with Michael C. Jensen, Jesse Isidor Straus Professor of Business Administration, Emeritus, Harvard Business School, 2 J. APP. FIN. 7, 8 (2010) ("Bill and I accepted the task to present a paper somewhat similar to Milton Friedman's famous piece on the business of business is to maximize profits. (…) Bill and I were working on putting this paper together and the more we looked at it, the more we became convinced that we couldn't say that profit maximization was a positive description of what went on in firms. This was the beginning of breaking open the black box of the firm.").

[66] *See*, *e.g.*, EASTERBROOK & FISCHEL, *supra* note 24, at 38 (adopting the trickle-down view that "maximizing profits for equity investors assists the other constituencies automatically"); Armour, Hansmann, Kraakman & Pargendler, *supra* note 24, at 23 (describing the view that "focusing principally on the maximization of shareholder returns is, in general, the best means by which corporate law can serve the broader goal of advancing overall social welfare"). For a critique of the premises of agency theory, *see* Jennifer G. Hill, *Hidden Fallacies in the Agency Theory of the*

incorrect: directors as such are not legally agents (not even of the corporation), and much less so of shareholders. But it does the job of leaving broader stakeholders out of the picture. Subsequent canonical formulations have expanded agency problems to cover (i) the manager-shareholder problem, which dominates in widely held firms, (ii) the controlling shareholder-minority shareholder agency problem, which dominates in controlled firms, and (iii) the agency problem between shareholders and contractual counterparties of the corporation, most notably creditors.[67] All such agency problems are critical considerations that, however, do not reflect legal concepts of agency and serve to obfuscate broader interests potentially at stake.

This is emphatically not to deny that mitigating opportunistic behavior by managers and controlling shareholders—as agency theory suggests—is a worthwhile objective, both intrinsically and for broader social reasons, as discussed below. The problem of "other people's money" is real. Adam Smith, often regarded as the father of modern economics, was highly critical of corporations and believed the problem was insurmountable.[68] Yet Smith's pessimistic view was mistaken in one respect: corporations came to dominate modern economic life. In large part, this is because law plays a key role in mitigating this problem. The issue with the agency problem framing is not that it identifies a non-existent problem—the problem is both real and important—but that it prevents us from seeing other important problems also deserving of attention.

D. Corporate Law as Product

Not only is corporate law viewed as contract, but standard programming views corporate law as a product—and in a good way. To be sure, programming acknowledges the traditional debate on regulatory competition: the paradigms of a "race to the bottom" versus a "race to the top."[69] Yet the undertone certainly comes from Roberta Romano's view that state competition is the "genius of American corporate law,"[70] with corporate law best understood as a "product" that states sell and refine in the interests of willing buyers.[71] The market for corporate law largely depends on a strong version of the internal affairs doctrine, the choice-of-law rule that lets the state of incorporation govern the corporation's internal affairs regardless of where it operates, without which regulatory competition could not function.[72]

Corporation, *in* HIDDEN FALLACIES IN CORPORATE LAW AND FINANCIAL REGULATION: REFRAMING THE MAINSTREAM NARRATIVES (Alexandra Andhov, Claire A. Hill & Saule T. Omarova eds., 2024).

[67] Armour, Hansmann, Kraakman & Pargendler, *supra* note 24, at 2.

[68] Smith, *supra* note 61.

[69] The main formulations of this debate come from William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (decrying the "absurdity of this race for the bottom, with Delaware in the lead."); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (for an early articulation of what came to be known as the race to the top theory).

[70] ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

[71] Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON. & ORG. 225 (1985).

[72] On contested contours of the internal affairs doctrine, *see* Ann M. Lipton*, Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 WAKE FOREST L. REV. 321 (2023).

Concerns with corporate law as product largely parallel the problems of the contract view. If corporate law is a contract, in this view, it is a contract between shareholders and managers, on the one hand, and states, on the other—who "sell" corporate law. That is quite literally the case. Tiny states that have more to gain from franchise taxes as a percentage of total revenue, and have fewer stakeholders of their own, have an advantage in the charter market.[73] The absence of stakeholders in the state is then sold as an advantage—since stakeholder demands, or "politics," are unable to impinge on shareholders' interests. Indeed, the market-dominant jurisdictions selling corporate law around the world are typically small, having few stakeholders of their own.[74] The democratic deficit associated with small states governing the rest of the country, if not the world, is left outside. After all, other stakeholders' interests are—remember—outside the scope.

To be sure, the dynamics of regulatory competition restrict what states can do to protect stakeholders. It is an engine of corporate law flexibility that eliminates rules that shareholders and managers do not like.[75] Critics of regulatory competition within the L&E tradition have drawn attention to externalities produced by this market in areas such as hostile takeovers, corporate disclosure, and creditor protection.[76] However, this externality inquiry has often proved too narrow by, for instance, neglecting how corporate law interacts with legal compliance obligations.[77]

The literature on corporate law as product also neglects the fact that the choice of state of incorporation determines not only the applicable corporate law but also profoundly affects the general public by determining *other* legal consequences such as taxation, regulatory obligations, and general jurisdiction.[78] International tax havens selling corporate charters deprive states of much-needed funds for democratic governance.[79] By offering opacity with respect to shareholders'

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[73] GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 75 (2015) ("In some microstates, most of government revenue derives from fees levied on the incorporation of shell companies, trusts, and similar arrangements.").
[74] CHRISTOPHER M. BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD (2016) (describing how small jurisdictions such as Delaware have become major players in corporate and financial services).
[75] Jens Dammann, *The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law*, 65 HASTINGS L.J. 101, 101 (2014) ("regulatory competition has eroded mandatory corporate law norms in the United States").
[76] *See*, *e.g.*, Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1441 (1992) ("In designing corporate law rules, states competing to attract incorporations will have an incentive to focus on the interests of managers and shareholders and to ignore the interests of third parties not involved in incorporation decisions."). Bebchuk notes how regulatory competition undermines the protection of other constituencies through corporate law, but largely dismisses this concern by granting "that the most efficient legal rule may be one that requires managers to serve only shareholders' interests and leaves the protection of other constituencies to non-corporate bodies of law such as antitrust law, consumer protection law, and employment law."). *Id.* at 1491.
[77] *See* Part V *infra* on the social consequences of traditional corporate law.
[78] *See* Pargendler, *Regulatory Partitioning*, *supra* note 60, at 268, 272-75 ("precisely because the corporation serves as a separate nexus for regulation, it operates as a powerful instrument for regulatory arbitrage.").
[79] *See*, *e.g.*, ZUCMAN, *supra* note 73, at 1 ("Tax havens are at the heart of financial, budgetary, and democratic crises.").

identity and lobbying against disclosure of beneficial ownership, competing jurisdictions in the regulatory race undermine enforcement of public regulations and facilitate crime and corruption.[80]

Admittedly, regulatory competition only exists where it is permitted to exist.[81] It is a political decision rather than a natural outcome. U.S. states have reacted to potential federal preemption, which constrains the scope of competition.[82] However, offshore incorporation in jurisdictions such as the Cayman Islands and British Virgin Islands has escaped such constraints and operated beyond the reach of democratic accountability.[83] Strikingly, programming has not only described the dynamics of competition in shaping the field but also celebrated this dynamic without adequate concern for its broader implications—including by casting its strong democratic deficit as an unambiguous virtue. Modularity, the contract view, agency costs, and corporate law as product form a snap-fit kit: distinct pieces designed to click together into a single, highly portable account of corporate law that keeps broader social issues firmly off the agenda.

E. L&E Theories as Broader Political Projects

LPE contends that L&E theories are not merely technocratic: they often embed, or help advance, broader political projects.[84] The development of key L&E concepts in corporate law, including the ideas of nexus of contracts, agency costs, and the market for corporate control, supports this claim.

Michael Jensen and William Meckling's seminal article—which with the same stroke coined the term *agency costs* and the idea of a *nexus of contracts*—was a self-conscious effort to rebut growing calls for corporate social responsibility (CSR) in the 1960s and 1970s.[85] The piece originated in a lecture commissioned to counter the idea of CSR then being advocated by progressive nonprofits.[86] Their original project was to write a paper on the "antisocial responsibility of business," aiming to "translate Friedman's journalistic articles into the language of economics."[87] As Jensen and Meckling present the result in their seminal piece:

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[80] *See*, *e.g.*, Michael C. Findley, Daniel L. Nielson & J.C. Sharman, GLOBAL SHELL GAMES: EXPERIMENTS IN TRANSNATIONAL RELATIONS, CRIME, AND TERRORISM (2014); Casey Michel, *How Delaware Became the World's Biggest Offshore Haven*, FOREIGN POL'Y, Nov. 11, 2021 (attributing the "globe-trotting criminal to turn to Delaware" as "greatest fount of anonymous shell companies the world has ever seen").

[81] Dammann, *supra* note 75, at 101 ("[R]egulatory competition exists where it is allowed to exist.").

[82] Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 588 (2003) ("that which persists in Delaware is that which the federal authorities tolerate.").

[83] William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 403 (2020) (describing rising competition for corporate charter from offshore jurisdictions such as the Cayman Islands, the British Virgin Islands, and Bermuda).

[84] Sanga, *supra* note 3.

[85] *See* Mariana Pargendler & Elizabeth Pollman, *Engines of External Governance*, 115 GEO. L.J. (forthcoming 2027).

[86] *Id.*; David Gindis, *On the origins, meaning and influence of Jensen and Meckling's definition of the firm*, 72 OXFORD ECON. PAPERS 966, 969 (2020).

[87] FOX, *supra* note 64, at 161. *See also* for a broader account of Jensen and Meckling's contributions, Brian Cheffins, *What Jensen and Meckling really said about the public company*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds., 2021) (arguing that the authors were not originally critics of the public company as they came to be depicted).

> "Viewing the firm as the nexus of a set of contracting relationships among individuals also serves to make it clear that the personalization of the firm implied by asking questions such as 'what should be the objective function of the firm,' or 'does the firm have a social responsibility' is seriously misleading. The firm is not an individual."[88]

Voilà—the corporation is essentially empty, and corporate law should focus exclusively on the relationship between shareholders and managers. Case closed. But Jensen and Meckling's agenda was not limited to the modular move of fighting corporate social responsibility within corporate governance. Their contemporaneous writings reveal a broader political project: a sustained warning that emerging government regulation threatened the very existence of the business corporation and risked its imminent demise.[89] Jensen and Meckling also argued that markets and democracy were incompatible, and unambiguously favored the former.[90] Read against this background, the technical concepts coined in the 1976 article were conceived as instruments of a broader market-oriented agenda openly hostile to democratic regulation of corporate power.

This is not an isolated example of technocratic economic concepts being coined or mobilized for broader aims. Another case in point is Henry Manne's celebrated account of "the market for corporate control"—a central idea in the L&E canon.[91] Its appeal lies in providing a

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[88] Jensen & Meckling, *supra* note 41, at 311.

[89] See Michael C. Jensen & William H. Meckling, *Can the Corporation Survive?*, FIN. ANALYSTS J., Jan.–Feb. 1978, at 31, 32 (arguing that because of the constraints of securities, antitrust, labor, and environmental regulations, among others, "the corporate form of organization, in particular, is likely to disappear completely"). They add: "Even if it survives in some form the larger corporations as we know them are destined to be destroyed. Indeed in a few industries we believe their demise is imminent." *Id.* at 32. Jensen and Meckling go on to list numerous regulatory initiatives that, in their view, qualify as dangerous "revocation of rights" that threatened the corporate form of organization: "1. The first peacetime wage and price controls in the United States, imposed in August 1971. 2. Environmental protection programs: a) Section 110A of the 1970 Clean Air Act limiting the rights of landowners to develop such projects as major new shopping centers and requiring that individuals file environmental impact statements and meet the requirements of regional planning boards before implementing such projects. b) EPA standards banning the use of high sulfur coal in many areas and forcing many utilities to convert from coal to oil. Federal Energy Agency rulings forcing many of these same utilities to reconvert from oil to coal. 3. Land use planning and control: a) Outright prohibition of further development of California coastline properties for several years and subsequent severe limitations on building. b) Stringent new restrictions limiting the use of lakes and land owned by individuals in the Adirondacks State Park in New York. c) A 1973 Minnesota law placing all "contained" water in the State (lakes, potholes, marshes and even puddles) under public ownership and control. 4. Spread of rent controls in metropolitan areas such as Washington, D.C. and Boston. 5. Provisions of the Occupational Safety and Health Act (OSHA) limiting the freedom of individuals to contract with employers to work under more hazardous conditions in return for higher pay. 6. Various Affirmative Action Programs of the Department of Health, Education and Welfare severely restricting employment policies. 7. The recent federal pension reform act (ERISA) limiting the type of pension programs firms may offer to their employees. 8. The regulation of the oil industry by the Federal Energy Administration, including fixed prices of output and imposed production controls.". *Id.* at 33.

[90] Michael C. Jensen & William H. Meckling, *Between Freedom and Democracy*, 127 THE BANKER 38 (1977) ("The incompatibility between democracy and free markets concerns me for two reasons: (1) I happen to value freedom more than anything else in the world… *The rights of free speech and the right to vote and the other political freedoms which we normally hold in such high regard are important to me only to the extent that they influence our abilities to protect the freedom of choice granted to us in the private sector of the economy*. (2) With the elimination of many of these rights and freedoms will come a substantial reduction in our real standard of living—our wealth") (emphasis added).

[91] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

market-based response to agency costs: poor managerial performance depresses share prices, creating opportunities for management teams hoping to increase value by doing a better job. Anticipating this disciplinary threat, managers face stronger incentives to maximize firm value.

In the modular world of orthodox corporate law, the market for corporate control is famous for identifying in hostile takeovers a market solution to agency costs—albeit a controversial one.[92] It came to be used, including by Manne himself, as a response to Berle and Means's concern that the separation of ownership and control created a serious incentive problem requiring government intervention.[93] What is far less recalled is that this was not the primary aim of Manne's intervention. Manne's principal objective was to legitimate mergers: to rescue them from antitrust suspicion by recasting them as socially valuable mechanisms of managerial discipline. The article opens by noting that "[i]n recent years many of the traditional economic justifications for our antitrust laws have been seriously questioned" and a "new sophistication has developed, and economic activities frequently held illegal by the courts are now thought by many to be consistent with our antitrust goals"—yet "[m]ergers among competitors would seem to have no important saving grace."[94] Manne set out to supply precisely that saving grace, describing certain mergers as "of considerable importance for the protection of individual non-controlling shareholders" and "desirable from a general welfare-economics point of view."[95]

Beyond his corporate law scholarship aiming to curb antitrust enforcement, Henry Manne stands out for having built the institutional infrastructure for the L&E movement itself, with an anti-regulatory project in mind. He helped launch the Economics Institute for Law Professors (1971), the Law & Economics Center (1974), the Economics Institute for Federal Judges (1976), and the American Law and Economics Association (1991), with funding from the John M. Olin Foundation, the Scaife family trusts, the Liberty Fund, and an array of corporate donors including IBM, Pfizer, Exxon, and others.[96] In a letter to Olin, Manne stated his goal that "[t]he John M. Olin

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[92] For a critique of the efficiency of hostile takeover by prominent mainstream economists, who argue that shareholders' gains from hostile takeovers result from opportunistic breaches of implicit promises to employees, *see* Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES (Alan J. Auerbach ed., 1988) (suggesting that "takeovers that limit managerial discretion increase the acquired firm's market value primarily by redistributing wealth from corporate stakeholders to shareowners").

[93] Henry Manne, Interview with Henry Manne 24 (Sec. & Exch. Comm'n Hist. Soc'y, Aug. 6, 2012) (James Stocker interviewer) (transcript), https://www.sechistorical.org/collection/oral-histories/20120806_Manne_Henry_T.pdf. ("This little piece, The Market for Corporate Control, explained the mechanism whereby the market provides the protection against the possibility that Berle had raised, and it was through having votes attached to shares with an open market for shares, so that you could go out and actually amass enough votes to take over control.").

[94] Manne, *supra* note 91, at 110.

[95] *Id.* at 119.

[96] *See* Geoffrey A. Manne, *In Memoriam: Henry G. Manne (1928–2015)*, Int'l Center for Law & Econ. (Jan. 20, 2015), https://laweconcenter.org/resources/memoriam-henry-g-manne-1928-2015/; STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); David Gindis, *Law and Economics Under the Palms: Henry Manne at the University of Miami, 1974–1980* (Working Paper, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567105; *History*, American Law and Economics Association, https://www.amlecon.org/ ("In January, 1990, Henry Manne, who was Dean of George Mason University Law School, convened a meeting to discuss the organization of an association. Dean Manne also secured initial funding for the development of an association from the John M. Olin Foundation.").

Law and Economics Center would be an East Coast anchor of conservative intellectual thought comparable to the Hoover Institution on the West Coast;"[97] an Olin foundation officer admitted that the advantage of L&E is that "it has a philosophical thrust in the direction of free markets and limited government" so that "it seems neutral but it isn't in fact."[98] Manne's outreach to corporate donors, in turn, emphasized the potential impact of Chicago economics as "the only thing that could possibly save them from an antitrust debacle."[99] A recent study has found that, after attending Manne's Economics Institute for Federal Judges, judges adopted more conservative rulings in regulation matters and harsher criminal sentences.[100]

Henry Manne was not alone in developing economic theories of organizational economics with antitrust (or anti-antitrust) implications in mind. Nobel laureate Oliver Williamson's theory of the firm was likewise shaped, in significant part, by the goal of challenging antitrust's existing treatment of vertical integration and vertical market restrictions.[101] His intellectual effort paid off in changing the terms of antitrust enforcement, with the U.S. Supreme Court overruling the very *Schwinn* doctrine Williamson had reacted against just two years after his seminal book *Markets and Hierarchies: Analysis and Antitrust Implications* appeared.[102]

This means that, while corporate law was thought to be modular and purportedly outsourced concerns with corporate and market power to other areas of law, central economic theories in corporate law and organizational economics were devised precisely to intervene in antitrust law as another field tasked with constraining corporate power. This is not to suggest that

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[97] TELES, *supra* note 96, at 126.
[98] *Id.* at 183, 189 (quoting an interview with James Piereson, executive director of the Olin foundation from 1985 to 2005). By way of disclosure, I was awarded an Olin Summer Research Grant by the Center for Studies in Law, Economics, and Public Policy at Yale Law School in 2006 and 2009.
[99] *Id.* at 108 (quoting Henry Manne on his fund-raising efforts: "when I went for fund-raising, I wanted $100,000, and I thought I could handle a fund-raising job of raising $10,000 from ten of them [major corporations]. I wrote to eleven, and I related it heavily to antitrust. At this point, the world knew that Chicago economics was the only thing that could possibly save them from an antitrust debacle, and I related it strongly to that. I said it was a way to get these ideas across to a large number of law professors who create the lawyers and government officials. Well, of the eleven I wrote to, within a few weeks I had $10,000 from ten of them, and the last $10,000 came in a few weeks later."). Manne's reliance on corporate donors was not idiosyncratic but reflected a sustained pattern of corporate support to L&E. *See* Robert Van Horn, *Corporations and the Rise of Chicago Law and Economics*, 47 ECON. & SOC'Y 477, 478-79 (2018) (exploring the relationship between corporations and Chicago L&E from 1946 through the mid-1950s, and concluding that "[c]orporations made possible the rise of Chicago law and economics through funding and advice," while "Chicago law and economics provided corporations with scholarly publications that championed a free market economy and challenged the status quo antitrust positions of government officials and many economists, especially those who advocated for vigorous antitrust enforcement.").
[100] Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences*: *The Impact of Law and Economics on American Justice*, 141 Q. J. ECON. 845, 881 (2026).
[101] Oliver Williamson, Nobel Prize Lecture, Dec. 8, 2009, at 460, https://www.nobelprize.org/uploads/2018/06/williamson_lecture.pdf ("By reason of what I perceived to be truncated and defective reasoning with *Schwinn* and other cases [while serving as Special Economic Assistant to the head of the Antitrust Division of the U.S. Department of Justice], I decided to revisit vertical integration and vertical market restrictions when I resumed teaching at the University of Pennsylvania.").
[102] OLIVER WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

these theories are wrong or malicious. Rather, they show how the purported separability on which modularity depends is untenable. These developments also show how modularity can operate as a form of "divide and conquer": even after fields are divorced, one may be weakened by concepts and considerations developed in the other. Antitrust was weakened by the very organizational economics that corporate law modularity had supposedly walled off from it. Recent empirical work suggests this intellectual project succeeded not on its merits alone but with significant support from incumbent business interests, for whom Chicago-school antitrust served as a useful vehicle.[103]

Finally, Milton Friedman's famous critique of CSR was not a mere technocratic defense of modularity, or a strict shareholder orientation for corporate law, but rather aimed to tackle a broader battle, specifically containing the rise of government and collectivist ideology. Friedman's New York Times article specifically articulated the problem of CSR as producing a slippery slope that delegitimizes profit-seeking and leads to greater collectivism and social intervention.[104] In his words, CSR "helps to strengthen the already too prevalent view that the pursuit of profits is wicked and immoral and must be curbed and controlled by external forces," namely "the iron fist of Government bureaucrats."[105] In sum, he viewed the primary danger of CSR as "the most explicitly collectivist doctrine" and a "fundamentally subversive doctrine" in a free society.[106] In this sense, the ostensibly technical defense of modularity functioned as a vehicle for a larger political project, namely limiting the perceived legitimacy of collective social control over the corporation.

II. Doctrinal Fetishization: Limited Liability and Corporate Separateness

We have seen how the L&E frameworks of modularity, the contract view, agency costs, and corporate law as product come as a snap-fit kit: distinct pieces designed to click together into a single, highly portable account of corporate law that keeps broader social issues off the agenda. However, other forms of programming are problematic in their uncritical fetishization of stylized elements of legal doctrine, such as limited liability and corporate separateness. Here, L&E provides key lenses and works that challenge the status quo. Ironically, progressive scholars have at times contributed to this fetishization based on their implicit understanding that the conception of the corporation as a "separate entity" leads to the decentering of shareholders' interests and is more conducive to a stakeholder view.[107] Yet this naturalization of corporate separateness is a

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[103] Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States*, 85 ANTITRUST L.J. 441 (2023).
[104] Friedman, *supra* note 44.
[105] *Id.*
[106] *Id.*
[107] KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 27 (2018) (relating corporate personhood to a vision of pluralistic governance of corporations); LYNN STOUT ET AL., THE MODERN CORPORATION: STATEMENT ON COMPANY LAW 2 (2016), https://ssrn.com/abstract=2848833 (arguing that the concept of legal personhood is incompatible with the claims that shareholders own corporations and that directors are required to maximize profits for shareholders).

dangerous form of programming, both because of the risks of limited liability and because of the ways in which corporate separateness can be used to deflect the regulatory power of the state.

Limited liability is traditionally the most celebrated attribute of the corporate form.[108] It is also controversial, including among L&E scholars, especially with respect to claimants who could not negotiate with the corporation (involuntary creditors, such as tort victims) or that are contractual claimants unable to adjust the terms of trade to mirror the risk of default (nonadjusting creditors, such as workers).[109] Because shareholders capture the upside but are not responsible for harm caused by the firm, limited liability arguably makes the corporation an "externalizing machine."[110] In the application of limited liability to external constituencies—and especially in corporate groups—we see once again corporate law operating to (negatively) affect the sphere of third parties who had no contract with the firm at all.[111]

Concerns about the inefficiency of limited liability with respect to involuntary and non-adjusting creditors have a long historical pedigree,[112] but gained new traction from L&E. Hansmann and Kraakman—the same L&E luminaries who posited "The End of History for Corporate Law" toward a strict shareholder orientation[113]—advocated for "unlimited liability for corporate torts."[114] Richard Posner, a "founding father" of L&E, was similarly skeptical about the general efficiency of limited liability.[115] In this respect, the L&E framework is internally

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[108] STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 2 (2016) (defining limited liability as "[t]he key feature of the corporation that makes it such an attractive form of human cooperation and collaboration"); EASTERBROOK & FISCHEL, *supra* note 24, at 40 ("Limited liability is a distinguishing feature of corporate law—perhaps *the* distinguishing feature").

[109] *See*, *e.g.*, Henry Manne, *Our Two Corporations Systems: Law and Economics*, 53 VA. L. REV. 259, 263 (1967) (arguing that the usual economic justification for limited liability "does not account for the problem of the involuntary creditor, or others who might in some sense be considered noncommercial creditors," such as workers. Manne posits that, if the problem of workers' compensation had not been resolved in other ways, "it is possible that tort victims and employees would have been excluded from the concept of limited liability").

[110] The expression comes from ROBERT A.G. MONKS & NELL MINOW, POWER AND ACCOUNTABILITY 24 (1991) ("Despite attempts to provide balance and accountability, the corporation as an entity became so powerful that it quickly outstripped the limitations of accountability and became something of an externalizing machine, in the same way that a shark is a killing machine—no malevolence, no intentional harm, just something designed with sublime efficiency for self-preservation, which it accomplishes without any capacity to factor in the consequences to others.").

[111] Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 253 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2025) (arguing that "the case for enforcing external partitions [outside the group] is stronger than the case for enforcing internal partitions [inside the group]").

[112] *See*, *e.g.*, ELVIN R. LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS: A STUDY IN STOCKHOLDERS' LIABILITY (1936) (arguing that "limited liability is subject to diminishing returns" and arguing for its mitigation in the context of involuntary or non-investigating creditors and corporate groups, thus anticipating two themes of the L&E literature).

[113] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

[114] Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991) ("there may be no persuasive reasons to prefer limited liability over a regime of unlimited pro rata shareholder liability for corporate torts").

[115] Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 520 (1976) (arguing that separate incorporations for purposes of evading tort liability are socially inefficient in permitting the externalization of harm).

consistent: precisely because corporate law should focus on shareholders, it is imperative that other areas of law regulate corporations from outside; yet limited liability can get in the way of such external accountability.

This critique of limited liability is relatively mainstream among both L&E and critical scholars,[116] and it appears in prominent textbooks.[117] The problem of the programming here is not the normative assessment, but how the doctrine's own promises and tensions are examined—or, more often, not examined. The muddiness of veil piercing doctrine notwithstanding, corporate separateness is often taught doctrinally as a concept that is hard or impossible to change. Despite L&E and historical work suggesting the opposite, there is often insufficient "anti-necessitarianism" in how current institutions are presented.[118] There is also too little attention to the "residual flexibility and plurality" in existing law,[119] and to the seeds these provide for potential transformation.

There is often no mention in mainstream accounts that New York, the epicenter of global capitalism, has long imposed liability on the ten largest shareholders for wage claims—a regime that was extended to out-of-state corporations in 2016.[120] There are also more flexible standards for overcoming corporate separateness in the realm of labor and employment law in the United States, where the strict test for veil piercing does not apply, not to mention developments in the Global South.[121] More fundamentally, programming ignores how corporate law itself quietly but surely erodes corporate separateness when the goal is not to make shareholders liable but rather to uphold shareholder rights vis-à-vis subsidiaries, for instance, by requiring consolidated accounting and disclosures at the group level, allowing double and multiple derivative suits, or recognizing inspection rights with respect to subsidiary records.[122] Programming also typically neglects how other areas of law often overcome corporate separateness routinely, rather than exceptionally, for purposes of mitigating regulatory partitioning in ways that do not implicate the stringent tests for veil piercing.[123]

Unfortunately, the fetishization of limited liability and corporate separateness is then often used as cover against reform. In justifying his abandonment of early proposals that would impose

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[116] For critiques of limited liability by critical scholars, *e.g.*, Katharina Pistor, *Limited Liability Is Causing Unlimited Harm*, PROJECT SYNDICATE, Feb. 5, 2020; Paddy Ireland, *Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility*, 34 CAMBRIDGE J. ECON. 837 (2010) (arguing that limited liability "institutionalises irresponsibility").

[117] *See*, *e.g.*, SPAMANN & FRANKENREITER, *supra* note 13 (questioning the view that "large corporations also could not exist without limited liability.").

[118] The terms come from ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987)

[119] This formulation comes from Sam Moyn's critique of the LPE movement in ignoring lessons from critical legal studies. Samuel Moyn, *Reconstructing Critical Legal Studies*, 134 YALE L.J. 77, 80 (2024).

[120] *See*, *e.g.*, Mariana Pargendler & Olivia Pasqualeto, *Overcoming Corporate Separateness: The Early Origins of Group Liability for Workers and Beyond*, AM. J. COMP. L. (2026).

[121] *Id.*

[122] Mariana Pargendler, *The New Corporate Law of Corporate Groups*, 14 HARV. BUS. L. REV. 339 (2024).

[123] Pargendler, *Veil Peeking*, *supra* note 60, at 781 (describing corporate separateness as "on-and-off.").

parent company liability for human rights violations, John Ruggie, as the U.N. Special Representative on Business and Human Rights, argued that "[t]he abandonment of the foundational tenets of modern corporate law is not on the agenda."[124] Yet these foundational tenets are much contested and subject to numerous exceptions across legal fields, a fact that is usually absent from the Corporations curriculum.

Moreover, limited liability appears to be less binding vis-à-vis domestic victims in the "law in action" compared to the "law on the books," at least in cases of highly visible disasters. For instance, Exxon did not even attempt to claim limited liability for the harm caused by its subsidiary in the massive Exxon Valdez oil spill, arguably because public pressure and embarrassment deterred it from doing so.[125] Similarly, the parent companies ended up footing the bill for the major Deepwater Horizon oil spill, which resulted from operations of subcontractors of its subsidiary BP Exploration & Production, Inc. (BPXP). While BPXP initially argued that it would have "limited ability to pay a civil penalty,"[126] the Department of Justice argued that "the assets and liabilities of other BP Group entities are relevant to the Court's assessment of the economic impact of a penalty" imposed on the subsidiary.[127] The settlement of US$20.8 billion ultimately eschewed limited liability by providing for parent company guarantees from BP Corporation North America Inc. and BP plc.[128]

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[124] JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 188-89 (2013) ("The [previously proposed] Norms internationalize and adopt an enterprise liability model as the basis for determining the scope of liability for groups of related companies. This approach does, in a very simple way, eliminate one of the great complaints about globalization through large webs of interconnected but legally independent corporations forming one large economic enterprise. The problem, of course, is that, as a matter of domestic law in most states, the autonomous legal personality of a corporation matters. Most states have developed very strong public policies in favor of legal autonomy") (quoting Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 Colum. Hum. Rts. L. Rev. 101, 169-70 (2005)).

[125] Nina A. Mendelson, *A Control-Based Approach to Limited Liability for Corporate Torts*, 102 COLUM. L. REV. 1204, 1243 (2002); Phillip Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295, 334 (1996) ("With public indignation at a very high level, Exxon, the parent corporation, was concerned with the impact of the catastrophe on consumer attitudes. Accordingly, the parent corporation did not choose to contest its liability for the negligence of its subsidiary.").

[126] John Cruden, Steve O'Rourke & Sarah Himmelhoch, *The Deepwater Horizon Oil Spill Litigation: Proof of Concept for the Manual for Complex Litigation and the 2015 Amendments to the Federal Rules of Civil Procedure*, 6 MICH. J. ENVTL. & ADMIN. L. 65, 125 (2016).

[127] Post Trial Brief at 25, In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, No. 2170, Civ. No. 10-4536 (E.D. La. Mar. 27, 2015).

[128] Consent decree at 9, In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, No. 2179, Civ. No. 10-4536 (E.D. La. Oct. 5, 2015). Department of Justice, U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill, Press Release (Oct. 5, 2015) (https://www.justice.gov/archives/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater).

III. The Broader Stakes of Corporate Law

A. Shareholders and Stakeholders: Positive and Normative Indeterminacy (And the "It Does Not Work" Argument About Why Stakeholders Must Stay Out)

As mentioned above, programming foregrounds a laser focus on shareholders as the sole interests deserving of attention in corporate law. Yet the debate over whether corporate law should focus on shareholders alone or also on stakeholders is a very traditional—indeed, canonical—one in the field, which has never completely gone away.[129] Admittedly, the "shareholders vs. stakeholders" framing is an oversimplification: there is not one but multiple shareholders-versus-stakeholders debates.[130] On the shareholders' side: which shareholders' interests should matter, given that shareholders are themselves heterogeneous in terms of their risk preferences and time horizons?[131] Should the law prioritize the pursuit of shareholder wealth, or instead shareholder *welfare*, including the nonfinancial preferences of socially-minded investors?[132] Should the law empower minority or controlling shareholders, institutional investors or beneficial owners? On the stakeholders' side, there is a tradition of lumping all stakeholders writ large and balancing their interests, as well as proponents of focusing on a specific class of interest, such as workers or climate change.[133] There is also a marked evolution toward ever-broader conceptions of external stakeholder interests to be considered. While stakeholders were traditionally defined as contract counterparties such as workers, consumers, creditors, and suppliers, or at most in terms of local communities and the national economy, the recent debate has focused on broader objectives such as climate change, systemic risk, gender and racial inequality, and human rights.[134] Needless to say, these different interests can easily conflict with one another.

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[129] For a famous articulation in the 1930s, *see* Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?,* 45 HARV. L. REV. 1145 (1932); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932). For a discussion of different historical manifestations of this debate, *see* C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 KANSAS L. REV. 77 (2002). *See also* Jennifer Hill, *Corporations, Directors' Duties, and the Public/Private Divide*, *in* FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur B. Laby & Jacob Hale Russell eds., 2021).

[130] Roberto Tallarita, *Hohfeld in the Boardroom*, 43 YALE J. REG. (forthcoming 2026) (concluding that "disagreement in the corporate purpose debate is in fact rich and multifaceted and cannot be reduced to two grand theories").

[131] *See*, *e.g.*, Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 577-93 (2006) (describing numerous dimensions of shareholder heterogeneity).

[132] For an influential argument in favor of shareholder welfare, *see* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L. FIN. & ACCT. 247 (2017).

[133] *See, e.g.*, Matthew Bodie, *The Next Iteration of Progressive Corporate Law*, 74 WASH. & LEE L. REV. 739 (2017) (arguing that progressives should focus on "two types of stakeholders: shareholders and employees," in contrast to wide-encompassing stakeholder theory); Jeffrey N. Gordon, *Unbundling Climate Change Risk from ESG* (Working Paper, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4547679.

[134] *See*, *e.g.*, Luca Enriques, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholders Constituencies*, *in* THE ANATOMY OF CORPORATE LAW, *supra* note 58; Jeffrey N. Gordon, *Convergence, Diversity, and Divergence: The Two Axes of Corporate Law and Governance*, *in* OXFORD HANDBOOK ON CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2025) (distinguishing between "internal governance" and "externalities governance").

Beyond debates about the definition of shareholders' and stakeholders' interests, there is profound controversy about the *means* to achieve the desired ends.[135] While the mainstream approach focuses on shareholders' interests, there is fierce debate about whether board or shareholder power is more conducive to achieving these ends. There is also deep disagreement about which means promotes a stakeholder orientation: whether board empowerment, shareholder empowerment, stakeholder empowerment, or something else. As explained by Roberto Tallarita, "the corporate purpose debate is fundamentally about the scope and design of managerial privilege, rather than abstract commitments to shareholders or stakeholders."[136]

A highly salient strand of stakeholderist and progressive thinking favors managerial discretion to promote different forms of corporate social responsibility, or in Tallarita's terminology, the expansion of the managerial privilege, in the hope that positive social consequences will ensue.[137] The standard programming response is that this hope is unwarranted: what I will call the "It Does Not Work" response—this effort is futile if not perverse, as managers would use this enhanced discretion to promote their own interests without corresponding benefits to the public good. Adolf Berle favored a focus on shareholders precisely because of concerns with the alternative of unchecked managerial power.[138]

Consequently, programming teaches us, accountability through hard law is required—leading us back to other areas of law through the Modularity Approach. This form of skepticism of corporate power built into some versions of programming is an important one. It is hard to save the world with corporate law alone, and much harder relying exclusively on managerial benevolence. Relying on managerial discretion alone might be insufficient if not counterproductive—and might distract attention from much-needed government regulation. Indeed, the distraction may be by design. Support for extending the managerial privilege also comes from corporate advisors who embrace stakeholderism precisely as a means of forestalling government intervention.[139] If Friedman attacked CSR to contain the rise of government, the recent embrace of CSR often serves the same end. So far, so good.

Real-world examples give us good reasons to be cynical about managers' invocations of broader interests that have little bite. When BTR, a British firm, sought to acquire Massachusetts-based Norton Company, the latter's managers successfully argued for a statute imposing staggered boards on all corporations incorporated in Massachusetts—legislation passed on the basis of

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[135] *See*, *e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 548 (2002) (describing how different models can favor different means and ends).
[136] Tallarita, *supra* note 130.
[137] *Id.*
[138] Berle, *A Note*, *supra* note 129, at 1372 ("Unchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe.").
[139] *See* Martin Lipton, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth* (World Economic Forum 2016) ("Private ordering through the New Paradigm by corporations and investors who best know their respective concerns and needs is more likely to result in effective and balanced solutions than government intervention.").

nationalistic rhetoric about avoiding a "second British invasion" which would leave the firm "victimized" by a "foreign acquiror."[140] Yet less than two weeks after "winning a war of independence against a foreign power," Norton's managers agreed to a sale to a French conglomerate for a higher price, casting doubt on the sincerity of the nationalistic objections.[141] Similarly, Lucian Bebchuk, Kobi Kastiel, and Anna Toniolo have decried "How Twitter Pushed Stakeholders Under the Bus," with managers reneging on mission statements and stakeholder commitments in agreeing to sell the company to Elon Musk at a premium.[142]

While reliance on managerial benevolence is misplaced, programming often artificially constrains the corporate purpose debate to the theme of managers' fiduciary duties and the role of the managerial privilege.[143] Yet this is not the only avenue of *corporate law* intervention; it ignores proposals that would restrict the managerial privilege or otherwise create hard constraints on corporate action. Limited liability, described above, provides one example. But there are others. Progressive scholars have long defended different forms of stakeholder representation on corporate boards, though their potential remains debatable.[144] The problem is, of course, *which interventions* would be helpful, even if not fully transformative on their own. That is the conversation of deprogramming and for reprogramming—spoiler alert: it is hard. But the programming mantra that corporate law may "Never Ever" help address concerns about stakeholders, corporate power, and inequality is inadequate and must go.[145] This is the Never Ever component of programming that needs to go in deprogramming.

B. Corporate Power Redux

Programming's lesson that broader social concerns can Never Ever play a role obscures the fact that they have played a role. Beyond the idea of strengthening countervailing power, in the

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[140] Robert Daines, Shelley Xin Li & Charles C.Y. Wang, *Can Staggered Boards Improve Value? Causal Evidence from Massachusetts*, 38 CONTEMP. ACCT. RES. 3053, 3059 (2021).
[141] *Id.* at 3059.
[142] Lucian Bebchuk, Kobi Kastiel & Anna Toniolo, *How Twitter Pushed Stakeholders under the Bus*, 28 STAN. J.L. BUS. & FIN. 307 (2023).
[143] *See* Holger Spamann & Jacob Fisher, *Corporate Purpose: Theoretical and Empirical Foundations/Confusions*, *in* CORPORATE PURPOSE, CSR, AND ESG 66 (Jens-Hinrich Binder, Klaus J. Hopt & Thilo Kuntz eds., 2024) (arguing that a fiduciary duty orientation toward shareholders or stakeholders "makes no practical legal difference").
[144] The literature is too voluminous to be cited in full. *See*, *e.g.*, RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 125 (1976) (advocating the presence of an informed representative on the board for each public concern, such as environmental matters, consumer interests, compliance, among others); KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 112 (2006); ISABELLE FERRERAS, FIRMS AS POLITICAL ENTITIES: SAVING DEMOCRACY THROUGH ECONOMIC BICAMERALISM (2017); Grant M. Hayden & Matthew Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321 (2021); GRANT M. HAYDEN & MATTHEW BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE (2021); Jens Dammann & Horst Eidenmüller, *Corporate Law and the Democratic State*, 2022 U. ILL. L. REV. 963; Emilie Aguirre, Julie Yen & Julie Battilana, *An Organizational Theory of Corporate Law*, 50 J. CORP. L. 567 (2025). Jensen and Meckling also took aim at Germany's experiment with workers' board participation, also known as codetermination. *See* Michael C. Jensen & William H. Meckling, *Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination*, 52 J. BUS. 469 (1979).
[145] For a standard L&E account questioning the "never ever" argument from different angles, *see* Spamann & Fisher, *supra* note 143.

form of shareholder or stakeholder empowerment or corporate regulation, another strategy is *weakening* the corporate form itself—in Ann Lipton's words, "to make it *less* efficient, and therefore *less* powerful in the pursuit of profit."[146] Mark Roe has famously argued that the dispersed ownership structures prevailing in the United States are not the sole or primary product of the invisible hand of the market. Instead, a critical influence has been "populism"—defined as a "widespread attitude that large institutions and accumulations of centralized economic power are inherently undesirable and should be reduced, even if concentration is productive."[147] Roe labeled concern with private economic power "populist"—a term originating in the U.S. movement resisting big business and ultimately prompting the passing of the Sherman Act in the late nineteenth century.[148]

Yet populism is a polysemic term that also carries a strong negative connotation,[149] often denoting in modern mainstream political science "an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite.'"[150] Economist Barry Eichengreen has described populism as "divisive by nature," arraying, in his words, "the people against the intelligentsia, natives against foreigners, and dominant ethnic, religious, and racial groups against minorities."[151] There is much not to like in this connotation of populism, which is all too real and a major problem of our current times. Unsurprisingly, it is mostly critics, rather than proponents, that use the label "populist" to designate the current proponents of antitrust approaches about "bigness."[152] Yet here there is little in common between believing that bigness and corporate power might be matters of concern—as is arguably the case for many scholars associated with the LPE movement—and embracing anti-intellectual, bigoted and xenophobic agenda associated with some prominent currents, which are antithetical to LPE's concerns with inequality.

A key agenda for deprogramming would be to distinguish different meanings of "populist" or potentially rebranding concerns with economic power through "democratic" or "republican" conceptions of corporate law. These concerns are far from novel but have a strong historical pedigree in the United States, from the dismantling of corporate pyramids identified by scholars to the wave of corporate social responsibility in the 1960s and 1970s and their later ESG and DEI

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[146] Ann M. Lipton, *Will the Real Shareholder Primacy Please Stand Up?*, 137 HARV. L. REV. 1586 (2024) (reviewing STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION (2023)).
[147] MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN FINANCE 29 (1994).
[148] *Id.* at 28-29.
[149] *See*, *e.g.*, THOMAS FRANK, THE PEOPLE, NO: A BRIEF HISTORY OF ANTIPOPULISM (2020) ("From the very beginning, then, populism had two meanings. There was Populism as proponents understood it, meaning a movement in which ordinary citizens demanded democratic economic reforms. And there was Populism as its enemies characterized it: a dangerous movement of groundless resentment in which demagogues led the disreputable.").
[150] *See*, *e.g.*, Cas Mudde, *The Populist Zeitgeist*, 39 GOV'T & OPPOSITION 541 (2004).
[151] BARRY EICHENGREEN, THE POPULIST TEMPTATION: ECONOMIC GRIEVANCE AND POLITICAL REACTION IN THE MODERN ERA x (2018).
[152] *See*, *e.g.*, Erik Hovenkamp, *Economics or Populism? The Battle for the Future of Antitrust*, 93 U. CHI. L. REV. 413, 414 (2026) (describing as populist the view that "monopoly is not merely an economic concern—it also creates political power, enabling large firms to have an outsized influence on our government and politics").

incarnations, whatever their flaws and limitations. Even diehard proponents of L&E recognize how corporate law is profoundly shaped by politics, as exemplified by the U.S. states' protectionist responses to the hostile takeover wave of the 1980s, fueled by local coalitions of managers and workers, often in response to company-specific threats.[153]

C. Geopolitical Boundaries and the Political Economy of Legal Knowledge

Except for the recognition of regulatory competition, which allows corporate law to operate as a "product," programming pays no attention to jurisdictional boundaries.[154] In this way, it follows standard L&E thinking that largely ignores any boundaries for the social welfare calculus. The question of "[w]hose social welfare matters and whose benefits should be included in a benefit-cost assessment" has typically gone unasked.[155] One way to conceptualize this is by the implicit cosmopolitan view of caring for social (global) welfare. Yet this cosmopolitan tilt is often implicitly assumed rather than overtly defended, and it sits uneasily with actual U.S. regulatory practice, which has traditionally adopted a strictly domestic boundary in cost-benefit analysis.[156]

This boundary question is widely discussed in some areas—e.g., climate change and the regulation of emissions[157]—but far less so in corporate law and other areas. When U.S. interests are not well-served by rules aimed at promoting global welfare, various L&E thinkers, even progressive ones, appear to shift gears and favor U.S. *national welfare* as the appropriate metric.[158]

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[153] Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 189 (1987); Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L. J. 533, 535 (2020).
[154] For works taking these boundaries seriously, *see*, *e.g.*, Jeffrey N. Gordon, *The International Relations Wedge in the Corporate Convergence Debate, in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004); COMPANY LAW AND ECONOMIC PROTECTIONISM: NEW CHALLENGES TO EUROPEAN INTEGRATION (Ulf Bernitz & Wolf-Georg Ringe eds., 2010); Pargendler, *The Grip of Nationalism*, *supra* note 153; Curtis J. Milhaupt, *Corporate Governance in an Era of Geoeconomics*, 25 J. CORP. L. STUD. 1 (2025).
[155] Ted Gayer & W. Kip Viscusi, *Determining the Proper Scope of Climate Change Policy Benefits in U.S. Regulatory Analyses: Domestic versus Global Approaches*, 10 REV. ENV'T ECON. & POL'Y 245, 245 (2016) (noting that this issue, which they call "economic standing," "has received only limited attention in the scholarly literature").
[156] *Id.* at 252.
[157] The boundary question is explicit and well-developed in climate policy, where the choice between a "global" and a "domestic" social cost of carbon—that is, whether regulatory cost-benefit analysis should count climate harms to non-citizens—has been extensively debated, litigated, and contested across successive administrations. *See*, *e.g.*, Gayer & Viscusi, *supra* note 155, at 261 (noting that "putting equal weight on the GHG benefits to noncitizens and citizens represents a dramatic shift in economic policy" and arguing for a domestic-only focus for cost-benefit analysis); Richard L. Revesz, Jason A. Schwartz, Peter H. Howard, Kenneth Arrow, Michael A. Livermore, Michael Oppenheimer & Thomas Sterner, *The Social Cost of Carbon: A Global Imperative*, 11 REV. ENV'T ECON. & POL'Y 172 (2017) (defending a global perspective); Matthew J. Kotchen, *Which Social Cost of Carbon? A Theoretical Perspective*, 5 J. ASS'N ENV'T & RES. ECON. 673 (2018) (framing the debate about the domestic or global social cost of carbon). The topic has also been a recurring subject of executive action. *Compare* Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (directing agencies to confine cost-benefit analysis to domestic impacts), and Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025) (directing the EPA to consider eliminating the metric of the "social cost of carbon" altogether, on the ground that it renders "the United States economy internationally uncompetitive"), *with* Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021) (directing agencies to "capture the full cost of greenhouse gas emissions as accurately as possible, including by taking global damages into account"). The contrast with corporate law, where the boundary of the welfare calculus is rarely posed at all, is instructive.
[158] Jeffrey N. Gordon & Curtis J. Milhaupt, *China as a "National Strategic Buyer": Toward a Multilateral Regime for Cross-Border M&A*, 2019 COLUM. BUS. L. REV. 192 (2019) (expressing concern about Chinese acquisitions

This can be quite different from global social welfare in a wide array of areas of law, including corporate law, and can be in tension with the usual L&E paradigm. This raises a question often not posed: was shareholder primacy ultimately about U.S. interests rather than global welfare?

Deprogramming might want to spotlight not only domestic distributional implications but also global *distribution* across geopolitical lines. Let's revisit here the debate about limited liability which is traditionally tackled from an efficiency standpoint. It is also the case, however, that human rights or torts victims tend to be poorer than shareholders—that is, limited liability against involuntary creditors is not only economically inefficient but distributionally regressive. Limited liability also has perverse distribution implications along Global North-Global South lines, as most human rights and environmental abuses are concentrated in the Global South, while shareholders benefitting from limited liability of multinationals are overwhelmingly located in the North.[159] It should therefore come as no surprise that Global South jurisdictions have more aggressively challenged limited liability for environmental harm—yet these accounts are ignored entirely by standard programming.

Programming itself is highly parochial and has little on comparative corporate law, but even standard Comparative Corporate Governance programming focuses primarily on the Global North. This of course follows the general political economy of legal knowledge, which devalues legal systems of the Global South. Even if there is growing economic interest in the laws of "emerging markets"—notice the neocolonial language— these are traditionally viewed as failures and as governed by extralegal factors.[160] Their legal innovations are discounted, yet some of the most dramatic experiments with nonmodular corporate law arrangements, as with other areas of private law, have emerged in the Global South.[161] These include instances of "heterodox stakeholderism" such as exceptions to limited liability for the benefit of stakeholders, measures for racial inclusion in corporate governance in Malaysia and South Africa, mandatory corporate social responsibility in India and Mauritius, and workers' rights to enforce directors' duties in South Africa. These innovations are left out of the picture and of potential use for criticizing or reimagining existing arrangements.[162]

IV. The Crisis of Programming

In seeking novelty and appeal, the LPE critique might be tempted to ignore the nuances of previous scholarly evolution, both from critical and mainstream perspectives. That would be a mistake. Standard programming has long—indeed, always—been contested. Debates about the

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motivated by roles other than shareholder value, noting that "of particular concern is the potential loss of long-term innovative capacity and growth potential *of the U.S. economy*" (emphasis added)).

[159] *See* Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE U. L. REV. 535 (2024); Pargendler & Pasqualeto, *supra* note 120.

[160] For a critique of "emerging market" terminology and an examination of alternatives, *see* Mariana Pargendler, *Corporate Law in the Global South*, *in* OXFORD HANDBOOK ON CORPORATE LAW AND GOVERNANCE (2025).

[161] For an exploration, *see* LEGAL HETERODOXY IN THE GLOBAL SOUTH (Kevin E. Davis & Mariana Pargendler eds., 2025).

[162] Pargendler, *Heterodox Stakeholderism*, *supra* note 159.

purpose of corporations and the duties of directors have long been features of the field. To go further, the standard L&E approach that deprogramming fights was developed as a deliberate response to social contestations. Yet programming has been in enhanced crisis from within (i) since the financial crisis, and (ii) often with the support of L&E scholars.

Yet it is also the case that significant challenges to standard programming, also from within L&E, have emerged in the last two decades. A key turning point came through the global financial crisis of 2008, which was, at its origins, fundamentally a U.S. financial crisis that produced transnational consequences.

In addition to the disastrous economic effects, the financial crisis challenged mainstream economic predictions of the time and produced legitimacy concerns of a system that bailed out large and powerful financial institutions but not poor borrowers. The probing of then existing economic wisdom also reached orthodox corporate law. In the aftermath of the financial crisis, even the most ardent supporters of a modular shareholder orientation for corporate law argued that financial institutions are different because of the systemic risk externalities they posed.[163] Consequently, corporate law and governance thinking should be changed to incorporate (systemic risk) externalities—though this addendum was limited to financial institutions. Yet the argument would soon emerge that the problem of negative externalities—and the difficulties of regulating them outside of corporate law—was not limited to financial institutions, and that corporate governance would, or should, take a "welfarist" turn.[164]

Published in 2017, the third edition of *The Anatomy of Corporate Law*, acknowledges the view that "corporate law may be used to promote economic or social objectives beyond maximizing the value of the firm, such as reducing systemic risk, mitigating gender inequity, or protecting the environment"—an idea "as old as corporate law itself" that "has found renewed favor among lawmakers in the wake of the recent financial crisis."[165] A main update compared to earlier edition, written just before the financial crisis, was the significant number of then recent

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[163] Lucian Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247 (2010) (contending that common shareholders of financial institutions have incentives to favor excessive risk-taking, which counsels against using their interests as the benchmark for executive compensation design); John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35 (2014) (arguing that systemically important financial firms require a distinct corporate law regime because the negative spillovers of their failures will harm their diversified shareholders); Armour, Hansmann, Kraakman & Pargendler, *supra* note 24, at 25 (arguing that "the implications of the crisis were mostly confined to the governance regimes applicable to banks and other financial institutions, which have an unusual degree of interconnection and propensity to contagion," and that "there are good functional reasons for introducing special
regimes for bank governance that differ from ordinary business firms.").

[164] *See*, *e.g.*, Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 627 (2022) (explaining ESG in terms of asset managers seeking to mitigate climate change risk, financial stability risk and social stability risk that would harm the portfolios of diversified shareholders); Hart & Zingales, *supra* note 132, at 249 (proposing that corporate governance should target shareholder welfare over market value, on the ground that shareholders may have prosocial preferences, such as reducing environmental harm and gun violence, that market value fails to capture); Marcel Kahan & Edward Rock, *Corporate Governance Welfarism*, 15 J. LEGAL ANALYSIS 108, 109 (2023) (predicting a growing welfarist turn in corporate governance as an alternative to managerialism and shareholderism).

[165] Armour, Hansmann, Kraakman & Pargendler, *supra* note 24, at 24.

legal reforms that incorporated objectives beyond the mitigation of agency costs: ranging from the new focus on systemic risk to gender quotas and new disclosure requirements on sustainability, conflict minerals in the Democratic Republic of Congo, and the pay ratio between the CEO and the average worker as a metric of inequality.

This expansion of corporate law's goals is also a function of new actors seeking to shape corporate governance, such as international organizations and NGOs. Since the Asian financial crisis of the late 1990s, international organizations have recognized the interjurisdictional externalities of corporate law and helped promote what I termed "international corporate law."[166] Among the key moves was the United Nations-led move to replace the old term corporate social responsibility with the new rubric "ESG" for environmental, social, and governance factors. The move embedded a more market-friendly orientation as ESG being in the "clear self-interest" of investment markets."[167] In the 2010s, ESG spread as a polysemic buzzword among policymakers and market participants alike, used in ways both consistent with, and opposed to, a shareholder-value orientation.[168] Relatedly, nonprofit organizations took increased interest in influencing corporate law and governance to promote their social and environmental agenda at the national and transnational levels, appealing to corporations to mitigate the governance gaps left by economic globalization.[169] Meanwhile, writing (including within L&E[170]) on topics such as diversity, ESG and sustainable corporate governance proliferated widely among mainstream circles, and growing concerns with gender and racial inequities prompted various initiatives on DEI (diversity, equity, and inclusion) by corporations.[171]

The project of deprogramming is well under way. As L&E scholars are the first to emphasize, the L&E of today is not the L&E of yore.[172] There is also a long tradition of progressive corporate law scholarship seeking to redefine, rather than abandon, L&E approaches. Some of the

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[166] Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765 (2021).
[167] GLOBAL COMPACT, WHO CARES WINS: CONNECTING FINANCIAL MARKETS TO A CHANGING WORLD 3 (2004).
[168] *See* Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403 (2024) (describing the different usages of ESG).
[169] Pargendler & Pollman, *supra* note 85.
[170] *See*, *e.g.*, Gordon, *supra* note 164.
[171] For systematic empirical evidence of this shift, *see* Atinuke O. Adediran, *Corporate Law's Disciplinary Orthodoxy* (Working Paper, 2026) (on file with author) (studying more than 3,200 corporate law and governance articles published between 2015 and 2025 and finding that scholarship contesting the boundaries and social consequences of the field rose from a pre-2021 average of 36.2 percent to a post-2021 average of 51.4 percent, reaching parity with traditional firm-focused scholarship). *See also* Jill E. Fisch, Making Sustainability Disclosure Sustainable, 107 GEO. L.J. 923 (2019); John Armour, Luca Enriques & Thom Wetzer, *Green Pills: Making Corporate Climate Commitments Credible*, 65 ARIZ. L. REV. 285 (2023); Afra Afsharipour, Women and M&A, 12 UC IRVINE L. REV. 359 (2022) (examining the lack of gender parity in M&A); Jens Frankenreiter, Talia B. Gillis & Eric L. Talley, *Sex & Startups*, 42 J. REG. 591 (2025) (interrogating the relationship between gender and governance in startups); Afra Afsharipour, June Carbone, Naomi Cahn & Darren Rosenblum, *Inclusivity in Corporate Scholarship*, 94 UMKC L. REV. 617 (2026) (describing how women, people of color, and LGBTQ+ scholars have reshaped scholarship by introducing "new perspectives that challenge conventional views on corporate purpose, power, and value").
[172] Chilton et al., *supra* note 2, at 7 ("many of the scholars that are part of the contemporary law and economics movement are interested in the very same questions that motivate LPE, such as how the law contributes to economic inequality, racial discrimination, or climate change").

strongest critics of the shareholder-oriented model have worked from within L&E approaches to offer alternative models to standard programming.[173] In recent years, even articles by authors defending traditional approaches were often framed around nonmodular language.[174] A new generation of L&E scholars often engages in "upside down L&E," which uses the same analytical frameworks of standard programming but for distinct statist and pro-regulatory ends.[175]

All of this contributed to a significant erosion of standard programming. A new era of ESG (environmental, social and governance) and DEI (diversity, equity and inclusion) concerns was met with major political backlash in the United States, especially in the red, oil-producing states.[176] One interpretation is that the political economy prevents corporate law from achieving objectives that face political hurdles through other areas of law.[177] At the same time, U.S. corporate governance took a nonmodular turn in other ways, through increased nationalistic and geopolitical considerations taking the form of a new golden share in U.S. Steel as a condition for its acquisition by Nippon Steel and U.S. government equity positions in private firms such as Intel.[178] Meanwhile, on the other side of the Atlantic, the EU developments around a sustainability directive, following human rights legislation in many states, has made major strides in a broader antimodular direction even in a context historically more open to a broader view of corporate law.[179] At the same time, nationalistic and competitiveness concerns raise questions about the merits and consequences of these commitments.

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[173] *See*, *e.g.*, Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (relying on the economic theory on team production to question the standard L&E approach based on agency cost analysis); Bodie, *supra* note 133, at 745 ("scholars looking for a response to the dominant law and economics narrative need not forego economics to develop an alternative approach").

[174] *See*, *e.g.*, Zohar Goshen, Assaf Hamdani & Alex Raskolnikov, *Poor ESG: Regressive Effects of Climate Stewardship*, European Corporate Governance Institute – Law Working Paper No. 764/2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4771137 (opposing climate stewardship on distributional grounds as hurting the poor and exacerbating inequality); Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1 (2022) (arguing that the rise of institutional investors and common ownership has shifted wealth away from labor and increased inequality).

[175] *See*, *e.g.*, Dorothy Lund, *Public Primacy in Corporate Law*, 47 SEATTLE U. L. REV. 365 (2024) (exploring "the malleability of agency theory by showing that it could be used to justify a 'public primacy' standard for corporate law that would direct fiduciaries to promote the value of the corporation for the benefit of the public"); Kovvali & Macey, *supra* note 24 (using L&E lessons to advocate for stakeholder and state participation in corporate governance, including public ownership).

[176] *See*, *e.g.*, Omar Motala, *ESG Regulatory Divergence: A Comparative Analysis of the EU, SEC, and California's Climate Disclosure Requirements* (Working Paper, 2024, on file with the author) (discussing the role of differential exposure to fossil fuel investments in explaining variation in climate and ESG regulations); Afra Afsharipour & Darren Rosenblum, *The Inclusion Imperative for Repairing Corporate Governance*, European Corporate Governance Institute – Law Working Paper No. 897/2026, https://ssrn.com/abstract=6127586 (describing the rise and retreat of DEI practices).

[177] *See* Mark J. Roe, *Why Shareholder-Driven Corporate Social Responsibility Failed* (Working Paper, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6329838.

[178] Curtis Milhaupt, Mariana Pargendler & Dan Puchniak, *Corporate National Identity* (Working Paper, 2026).

[179] *See*, *e.g.*, Luca Enriques, Matteo Gatti & Roy Shapira, *How the EU Sustainability Due Diligence Directive Could Reshape Corporate America*, 78 STAN. L. REV. 241 (2026).

V. Frequently Unasked Questions

Reformist proposals resisting programming have often resorted to the same corporate law strategies but for different ends. The same core strategies of disclosure, board appointment rights, decision rights, managers' incentives schemes, and constraints through rules and standards can be directed to serve such broader objectives rather than the reduction of agency costs.[180] These include measures as varied as orienting securities disclosure toward the interests of stakeholders,[181] granting stakeholders and the state director appointment or voting rights with respect to corporate decisions,[182] influencing the incentive compensation schemes of managers by aligning them with stakeholder protection,[183] and tweaking liability rules in view of external harm.[184] There are actual experiments with many of these strategies around the world, and scholarly proposals across the board. Another common move is to focus on shaping the power from within by tweaking patterns of corporate ownership: reformers have long proposed state ownership, worker ownership, or more widely distributed modes of stock ownership as means of transforming corporate law through internal power shifts.[185]

More broadly, programming leaves many questions frequently not asked: what the broader social consequences of "mainstream corporate law" are, including who wins and who loses from existing corporate law regimes and reforms, and the role of corporate law in enabling (or resisting) concentrated private power. For instance, who actually owns and controls corporate America and corporations around the globe, and how concentrated is that ownership?[186] Scholars have begun examining these questions. A few recent examples, illustrative rather than exhaustive, convey the flavor of this scholarship. Much of it probes how seemingly neutral features of corporate governance or of corporate and securities law produce broader side effects such as concentration, inequality, or excessive scale.

Consider John Coates' "The Problem of Twelve."[187] Coates focuses squarely on the problem of concentrated power, though not of corporations but of the investors who own them: asset managers, on the one hand, and private equity firms, on the other. He also examines the

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[180] Enriques, Hansmann, Kraakman & Pargendler, *supra* note 134, at 93.
[181] *See*, *e.g.*, Ann Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. REG. 499 (2020).
[182] *See supra* note 144 and accompanying text.
[183] *See*, *e.g.*, Aguirre, Yen & Battilana, *supra* note 144.
[184] *See*, *e.g.*, Hansmann & Kraakman, *supra* note 114.
[185] *See*, *e.g.*, Jedidiah J. Kroncke, *ESOPs and the Limits of Fractionalized Ownership*, U. CHI. LEGAL. F. 287 (2017) (describing the appeal and limits of experiments of employee ownership); Ofer Eldar & Rory Van Loo, *Unequal Ownership*, 105 B.U. L. REV. 851 (2025) (arguing for policies that broaden ownership of public companies by middle- and low-income households).
[186] Although the United States has high levels of household participation in capital markets from a comparative perspective, the inequality in the distribution of equity ownership is stark. *See* OXFAM, INEQUALITY INC.: HOW CORPORATE POWER DIVIDES OUR WORLD AND THE NEED FOR A NEW ERA OF PUBLIC ACTION 23 (2024) (noting that, in the United States, "the richest 0.1% account for 19.8% of shares owned by households, the richest 1% own 44.6%, while the poorest 50% own just 1%").
[187] JOHN COATES, THE PROBLEM OF TWELVE: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING (2023).

benefits and costs of these powerful actors, but with a clear focus on externalities. For private equity, in particular, the analysis centers on the broader negative social consequences, from subsidized tax breaks to suppression of labor and increasing wealth disparities.[188]

Other works also investigate how standard corporate law rules may subsidize bigness. George Georgiev's article on "Too Big to Disclose" shows that the operation of the materiality standard means that large companies are able to disclose far less granular information than a smaller company.[189] The same US$300 million acquisition agreement can be deemed "material" for a smaller company and not material for a larger one. This shows how facially neutral securities law rules might favor large companies, creating regulatory subsidies for bigness.

Similarly, Jeffrey Gordon's work emphasizes how golden parachutes—designed to ameliorate firm-level agency problems—have helped produce "too many mergers" from a social welfare perspective, with negative implications for inequality.[190] This illustrates that the Questions Not Asked often operate jointly, rather than in isolation. The problem of "too many mergers" produced by corporate law incentives and corporate governance innovations operates on multiple fronts: they create incentives for concentration of power, increase inequality, and exacerbate social resentment. Yet corporate law analysis is often restricted to the agency framework alone.

For another example, the very operation of limited liability in corporate groups allows companies to grow tremendously while attributing harm to small units—another way in which corporate law might not only tolerate but may indeed subsidize bigness.

The demographics of share ownership are another question typically foreclosed by programming, even though they bear directly on who wins and who loses from corporate law rules. Who are the shareholders of U.S. companies, and how have their identities shaped the categories through which corporate law conceives of shareholders themselves? Sarah Haan has recovered what she calls the "feminization of capital": the now-forgotten fact, captured at the time by companies and the financial press, that women came to outnumber men as individual shareholders at major U.S. public companies during the first half of the twentieth century, including at AT&T, General Electric, and the Pennsylvania Railroad.[191] Haan argues that this prevalence of women shareholders coincided with, and helped shape, the consolidation of foundational corporate-law ideas, including the trope of the "passive" shareholder arising from the separation of ownership and control.[192]

Turning from share ownership to debt, "liability management transactions" are now all the rage, often raising eyebrows and spreading across the Atlantic. They are decried for blatant,

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[188] *Id.*
[189] George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602 (2017).
[190] Jeffrey N. Gordon, *Too Many Mergers? The Golden Parachute as a Driver of M&A Activity in the Twenty-First Century*, 30 STAN. J. L. ECON. & BUS. 172 (2025).
[191] Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 522-25 (2022).
[192] *Id.*

unconstrained opportunism. Yet who gains and who loses? Are they regressive, serving to concentrate wealth further? Probably yes, specialists say behind closed doors, but this is seldom a topic of scholarly inquiry or class discussion.[193]

To highlight the point further, consider *Tornetta v. Musk*, the Delaware case that resulted in the invalidation of Elon Musk's US$56 billion pay package, later reversed by the Delaware Supreme Court. The implications for concentrated wealth and power of sanctioning such a pay package—especially over a flawed process and possibly problematic disclosures—could not be more obvious. The challenges to the Modularity Approach are also clear: if this type of wealth concentration is concerning from a social standpoint, if not corporate law, which other field of law could be asked to intervene? Yet this is often not part of the conversation.

The years 2024 and 2025 marked the passing of controversial Delaware statutory reforms that can be read as a clear retreat from traditional corporate law. The reforms, passed with unprecedented speed, reflected political and market pressure coming from controlling shareholders, the private equity industry, and their advisors. We have seen a more credible threat of reincorporations to Texas and Nevada on an overt "race to laxity" theme, as these laws have been advertised as lax from the outset (Nevada) or recently amended to the same effect (Texas). At the same time, the Chairman of the U.S. SEC has questioned the legality of shareholder proposals in Delaware, while the agency has blessed the use of arbitration in public company charters for purposes of securities litigation. These are major changes that challenge shareholder protection and promise to increase agency costs. That is true, yet this is all we hear.[194] But it is not all there is.

One problematic aspect of programming is the general refusal to ask broader questions and consider the *social consequences of traditional corporate law*. Abusive controlling shareholder transactions may not only harm minority shareholders and hurt capital formation, but have broader consequences. Agency costs in the form of tunneling are often not only inefficient but also distributionally regressive. They further encourage ownership concentration and augment the political power of controlling shareholders over corporate governance and the political process.[195]

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[193] *But see* Jared Ellias & Narine Lalafaryan, *The Global Law of Debt* 69 (Working Paper, 2025), 75 DUKE L.J. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5871022 (noting that the Texas-based company, Fossil, "executed a coercive 'uptier' exchange that shifted value from retail bondholders and smaller institutional investors to larger institutional investors."). *See also* Mark Roe & Vasile Rotaru, *Liability Management's Limited Runway: Corporate Restructuring Today* 29 (Working Paper, 2026), 126 YALE L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6103369 (noting the various ways LMEs may represent rent-seeking by owners of the company, though the authors ultimately "do not suggest value transfer considerations drive most, or even many, LMEs.").

[194] For a notable exception, *see* Ann M. Lipton, *Corporate Governance Authoritarianism*, Jan. 16, 2026, https://www.businesslawprofessors.com/2026/01/corporate-governance-authoritarianism/ (originally delivered as the inaugural Tamar Frankel Lecture at Boston University School of Law on Nov. 24, 2025) (cataloguing numerous recent developments at the state and federal level that amount to "corporate governance authoritarianism").

[195] *See*, *e.g.*, Lucian Bebchuk & Kobi Kastiel, *Controllers Unbound*, 105 TEX. L. REV. (forthcoming), https://ssrn.com/abstract=6111106 (predicting that recent Delaware reforms will lead to an increase of controlled

Other forms of shareholder suits also constrain corporate power. Securities disclosure can produce socially valuable information. Securities lawsuits have predictably followed corporate disasters, thereby increasing the expected sanctions for social harm.[196] *Caremark*-style litigation can also be seen as a means of stakeholder protection by creating individual sanctions for corporate wrongdoing.[197] Yet these social benefits are often out of the picture, and we are witnessing a race to erode them.[198] Corporate governance mechanisms have long served as a form of separation of powers, even if limited and unsatisfactory. Today even that role is being questioned.

Nevertheless, under standard programming, critics of reforms can only attack them from a shareholder value perspective, which is harder in a moment of rising stock prices. One estimate of the costs of the Delaware reform concludes that it is welfare reducing—but only because it reduced the market price of Delaware firms by 1.4%.[199] The social benefits of corporate law in terms of curbing externalities and facilitating checks on corporate power are not even discussed, but are very much part of the stakes.[200]

There is also the myth that the U.S. corporate governance principles now under attack were built in view of shareholders' interests alone. That is not true. For example, the first requirement of independent directors in audit committees was enacted as a response to the corruption scandals of the Watergate era.[201] The independent directors' agenda was a midway solution to federalization proposals and calls for constituency directors by CSR advocates.[202] The "corporate governance

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companies and a decline in the equity stakes held by controllers); Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 131 (1999) ("once a country has legal rules that enhance the private benefits to controlling shareholders and thus encourage the presence of such controllers, the controllers' political power will also increase the likelihood that the country would continue to have such rules"); Randall Morck, *The Riddle of the Great Pyramids*, *in* OXFORD HANDBOOK OF BUSINESS GROUPS (Asli M. Colpan, Takashi Hikino & James R. Lincoln eds., 2010) (describing the political influence stemming from concentrated ownership of business groups); Kevin E. Davis & Mariana Pargendler, *Corruption and Controlling Shareholders*, 25 THEORETICAL INQ. L. 107 (2024) (describing the prevalence of controlling-shareholder led bribery and surveying the literature suggesting that entrenched controlling shareholders might have an advantage in making corrupt commitments credible).

[196] Merritt B. Fox & Joshua Mitts, *Event-Driven Suits and the Rethinking of Securities Litigation*, 78 BUS. LAW. 1 (2023) (noting the prevalence of event-driven securities lawsuits following disasters, which the authors find problematic).

[197] Enriques, Hansmann, Kraakman & Pargendler, *supra* note 180, at 99 ("Corporate law may also indirectly protect non-shareholder constituencies through the imposition of oversight liability on directors for failures to implement and monitor internal systems of compliance against illegal activity," which make "it likelier that illegal activities will be detected and their effects contained."). *See also* Roy Shapira, *The Challenge of Holding Big Business Accountable*, 44 CARDOZO L. REV. 203, 261-63 (2022) (arguing that director oversight duties can counteract the fragmentation of knowledge that makes the largest corporations resistant to legal, reputational, and moral discipline).

[198] *See* William J. Moon, *Havens for Corporate Lawbreaking*, 103 WASH. U. L. REV. 829, 829 (2026) ("emerging jurisdictions supplying corporate law to American corporations, such as Nevada and the Cayman Islands, have broadly eliminated doctrines that enable shareholder suits against directors and officers who turn a blind eye to corporate lawbreaking").

[199] Kenneth Khoo & Roberto Tallarita, *The Price of Delaware Corporate Law Reform* (Working Paper, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5318203.

[200] *But see* Lipton, *supra* note 194.

[201] Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 101 (2016).

[202] *Id.*

obsession" in the United States was built in view of varied and diverse social objectives, from curbing corruption and corporate power to reducing systemic risk, fraud, and inequality.[203] Mechanisms such as independent directors and shareholder empowerment are often insufficient and not bulletproof—and certainly not a justification for jettisoning regulation. But some checks and balances, however limited, are better than none. And even these basic limits are increasingly at risk today.

At any rate, the preceding analyses are best read as starting points rather than settled conclusions. This essay's aim is to show how programming forecloses critical questions, not to defend any particular set of answers. Sorting through which diagnoses are persuasive, and which are not, is the work that deprogramming makes possible.

VI. Deprogramming LPE?

Finally, it is important to acknowledge that, just as L&E's lenses are not ideologically neutral and shape our perception of reality, the same is true of LPE's. Just as the most extreme contractarian versions of L&E can be deemed "Panglossian" for their faith in market forces, the inherently critical LPE lens can be deemed "Malthusian" in highlighting distributional struggles, scarcity, and impending disaster—as well as for discounting the promise of corporate-driven innovation in producing *positive* externalities for the benefit of all: "making the pie bigger," "lifting all boats," and allowing benefits to "trickle down." Although not prominently articulated in Corporations programming or in L&E generally, another argument for sidelining concerns with externalities, corporate power, and distribution is that they throw sand in the gears of innovation, which is ultimately treated as the key to economic growth and as overriding all other concerns.[204] In this view, private law *subsidies* for bigness and risk-taking could be precisely the point. That storyline, however, also rests on contestable claims about what actually drives growth and about the real consequences of innovation, often reflecting competing ideologies rather than neutral empirical consensus. Genuine deprogramming should create space for asking all of these broader questions rather than evading them.

A further worry cuts the other way. If deprogramming demanded a totalizing account of how every rule bears on all of society, no one could supply it, and LPE has so far been long on critique and short on construction.[205] But deprogramming asks not for omniscience, only that questions not be ruled inadmissible before they are posed. The affirmative work is more modest

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[203] *Id. See also* Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817, 1831, 1855 (2007) (interpreting the reliance on independent directors as "speed bumps for otherwise risky behavior," with the Sarbanes-Oxley Act bringing about a "subtle 'accountability creep'").
[204] Robert Cooter & Aaron Edlin, *Law and Growth Economics: A Framework for Research* 13 (Working Paper, 2011) (criticizing L&E's focus on static efficiency and distribution as opposed to policies that promote growth, arguing that growth instead "overtakes other policy objectives").
[205] Sanga, *supra* note 3, at 547-48.

and tractable, proceeding one cross-cutting effect at a time, as in the examples above, so that critique becomes not the end of the enterprise but the clearing of ground for it.

A final qualification is in order. In addition to narrowing the lenses through which welfarist or instrumental analysis proceeds, programming has also displaced moral and non-instrumentalist arguments from the study of corporate law altogether. Whether LPE in its current form is well-positioned to explore them—given its commitment to social change and concrete impact—is itself an open question, and not one the present essay attempts to answer.

VII. Conclusion

Deprogramming Corporations invites broader and more critical examination of corporate law's role in our current economic and social order. LPE's critique of L&E is at once a red herring and a fair point: many L&E findings support LPE's core concerns, yet L&E's traditional framing obscures the broader issues that LPE aims to foreground. In their revamped versions, a deprogrammed L&E and a constructive LPE may well become indistinguishable.

Corporate law alone cannot save the world, but what if it could help? Such difficulties are no justification for retreating into the fictions of programming, which have never captured corporate law's real-world operations. A field this central to the economy and polity cannot afford artificial narrowness. Further intellectual resources for a broader examination and strategies to overcome the substantial political economy hurdles to reform are both needed, building on the deprogramming already underway.

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